Supreme Court, U.S.
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No. 01-____

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

Whether, in light of this Court's later decision in *United States v. Mead Corp.*, 121 S. Ct. 2164 (June 18, 2001), the court of appeals erred by deferring to an agency's interpretation of a statutory term, expressed for the first time in litigation, even though agency counsel thereby repudiated the agency's interpretation of the disputed term in the preamble to the notice-and-comment rule at issue in the litigation?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: Bank of America, N.A., successor-in-interest to Barnett Bank, N.A., and the Federal Deposit Insurance Corporation, an agency of the United States of America.

Bank of America, N.A., Petitioner here, and Appellant before the United States Court of Appeals for the Eleventh Circuit, is wholly-owned by Bank of America Corporation, a publicly traded corporation, in which no single shareholder owns 10% or more of its outstanding shares.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) 7, 11

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 7

Branch Banking & Trust Co. v. FDIC, 172 F.3d 317 (4th Cir. 1999) 6

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... 6, *passim*

Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) 7, 12

Matz v. Household Int'l Tax Reduction Inv. Plan, 227 F.3d 971 (7th Cir. 2000) 9, 10, 11, 12

United States v. Mead Corp., 121 S. Ct. 2164 (2001) ..... i, *passim*

United States v. Winstar Corp., 518 U.S. 839 (1996) 3

Weil v. Retirement Plan Admin. Comm. of the Terson Co., Inc., 933 F.2d 106 (2d Cir. 1991) 9

Wells Fargo Bank, N.A. v. FDIC, No. 00-1251 (CKK) (D.D.C. June 15, 2001) 6

Page

FEDERAL STATUTES AND REGULATORY MATERIALS

12 U.S.C. § 1815(d) 1, 4, 5, 6, 11

12 U.S.C. § 1817(l) 3

28 U.S.C. § 1254(1) 1

FDIC Proposed Rule, 61 Fed. Reg. 34751 (July 3, 1996) 12

FDIC Final Rule, 61 Fed. Reg. 64960 (Dec. 10, 1996) 4, 5

FDIC's General Counsel Op. No. 7, 60 Fed. Reg. 7059 (Feb. 6, 1995) 5

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 244 F.3d 1309. The opinion of the district court (App. 27a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2001. A timely petition for rehearing was denied on May 16, 2001 (App. 39a). On August 1, 2001, Justice Kennedy extended the time in which to file this petition until September 13, 2001 (No. 01-A99). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1815(d) ("Insurance Fees") of Title 12, U.S. Code provides in relevant part:

> (2) Conversions
>
> * * *
>
> (B) Conversion defined
>
> For purposes of this paragraph, the term "conversion transaction" means–
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> * * *
>
> (ii) the merger or consolidation of a Bank Insurance Fund member with a Savings Association Insurance Fund member;
>
> * * *
>
> (3) Optional conversions subject to special rules on deposit insurance payments
>
> * * *

(B) Assessments on deposits attributable to former depository institution

(i) Assessments by SAIF

In the case of any acquiring, assuming, or resulting depository institution which is a Bank Insurance Fund member, that portion of the deposits of such member for any semiannual period which is equal to the adjusted attributable deposit amount (determined under subparagraph (C) with respect to the transaction) shall be treated as deposits which are insured by the Savings Association Insurance Fund.

* * *

(C) Determination of adjusted attributable deposit amount

* * * [T]he adjusted attributable deposit amount which shall be taken into account for purposes of determining the amount of the assessment under subparagraph (B) for any semiannual period by any acquiring, assuming, or resulting depository institution in connection with a transaction under subparagraph (A) is the amount which is equal to the sum of–

(i) the amount of any deposits acquired by the institution in connection with the transaction (as determined at the time of such transaction);

* * *

STATEMENT OF THE CASE

This case involves multi-million dollar assessments by the Federal Deposit Insurance Corporation ("FDIC") against banks to provide monies for an FDIC-administered fund to insure the deposits of savings and loan associations – the Savings Association Insurance Fund or "SAIF." The FDIC prevailed in the court of appeals by taking the position, advanced for the first time by agency counsel in litigation, that a bank could be a "member" of *both* the FDIC-administered fund to insure bank deposits – the Bank Insurance Fund or "BIF" – and of the SAIF. The court of appeals then deferred to this interpretation of the statutory term "member," even though in promulgating the rule that authorized the disputed assessments the FDIC repeatedly stated that a bank could only be a member of the BIF and could *not* also be a member of the SAIF.

1. Before 1989, banks were insured by the FDIC, and savings and loan associations were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"). However, speculative lending and investments in the 1980's brought about the "savings and loan crisis," which resulted in the insolvency of FSLIC.[1] When Congress abolished FSLIC in 1989, it created two funds within the FDIC – the BIF for banks and the SAIF for savings and loans. *See* 12 U.S.C. § 1817(l). Thereafter, banks paid deposit-insurance premiums at the BIF rate while savings and loans paid significantly higher SAIF-rate premiums because of savings and loan failures.

To further alleviate the savings and loan crisis, Congress in 1989 adopted the Oakar Amendment to the

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[1] *See generally United States v. Winstar Corp.*, 518 U.S. 839, 846 (1996).

Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1815(d)(2) & (3). It provides that a bank which is the product of a "conversion transaction," defined as "the merger or consolidation of a [BIF] member with a [SAIF] member," – a so-called "Oakar bank" or "BIF Oakar bank" – would be required to make payments to *both* the BIF and to the SAIF. 12 U.S.C. § 1815(d)(3)(B). Under the Amendment, an Oakar bank's SAIF assessments are calculated according to its "adjusted attributable deposit amount" – the "AADA" – which is based on the amount of the deposits the bank acquired from the savings and loan in a "conversion transaction."[2] *Id.* § 1815(d)(3)(B) & (C). The Oakar Amendment makes no provision for the calculation of an AADA where a BIF-member bank acquires an Oakar bank, which is also a BIF member but holds some AADA deposits.

2. Nonetheless, through a notice-and-comment rule, the FDIC "interpreted" the Oakar Amendment as requiring a BIF-member bank that acquired a BIF Oakar Bank as having obligations to pay SAIF-rate assessments to the FDIC following the acquisition. 61 Fed. Reg. 64960, 64962-63, 64984 (Dec. 10, 1996). In doing so, the FDIC did not explain how a BIF-member bank that acquired a BIF Oakar bank could have engaged in a "conversion transaction" giving rise to that bank's liability to the SAIF when such transactions require a "merger or consolidation of a [BIF] member with a [SAIF] member." § 1815 (d)(2)(B).

To the contrary, the FDIC "accept[ed] the proposition that an Oakar [bank] is a member of its primary fund only [*i.e.*, the BIF], and is not a member of its secondary fund

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[2] Section 1815(d)(3)(C) imposes an AADA requirement by applying to all transactions "under subparagraph (A)," *i.e.*, § 1815(d)(3)(A), which permits certain "conversion transactions," including a merger between a BIF member and a SAIF member.

[*i.e.*, the SAIF] even though it holds secondary-fund deposits." 61 Fed. Reg. at 64962 (col. 3). The agency acknowledged that the Oakar Amendment "made it abundantly clear that a BIF-member bank continued to be a BIF-member after acquiring deposits from a SAIF member in an Oakar transaction." *Id.* The FDIC reaffirmed that it had always held this view of the Oakar Amendment and that "[t]he FDIC holds this view today." *Id.*[3]

Effectively conceding that this interpretation of the statutory term "member" made it impossible to square its characterization of a BIF-member bank's acquisition of a BIF Oakar bank as a "conversion transaction" with the plain language of the statute, the FDIC asserted that "nominal fund membership is not the touchstone for determining whether a transaction is a conversion transaction within the meaning of" § 1815(d)(2). *Id.* Instead, "membership" was deemed by the FDIC to be only a "label that denotes the formal relationship of an insured institution to the FDIC." *Id.* "Put another way, the FDIC considers that the label 'member' must be given only that degree of significance that is appropriate to preserve the integrity of the two-fund structure." *Id.* at 64963 (col. 1).

Applying the approach of its December 10, 1996 rule, with an effective date of January 1, 1997, the FDIC began to impose retroactive SAIF-based assessments for 1996 on BIF-member banks that had acquired BIF Oakar banks,

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[3] The FDIC based this conclusion on the text of other sections of the FDI Act. *See id.* (citing General Counsel's Op. No. 7, 60 Fed. Reg. 7059 (Feb. 6, 1995) (citing 12 U.S.C. § 1817(l)(1) (defining BIF member as an institution that "does not become a [SAIF] member"); 12 U.S.C. § 1817(l)(3) (assigning banks and savings and loans during 1989 "transition" period after FSLIC abolition to either BIF or SAIF membership))).

prompting at least three challenges, including the suit that gives rise to this petition.[4]

3. Barnett Bank (subsequently acquired by Bank of America) challenged the FDIC's SAIF assessment of more than $28 million by filing suit in the District Court for the Middle District of Florida. At the time, Barnett Bank, a BIF member, had recently completed a reorganization with sister banks, some of which had previously engaged in "conversion transactions" with SAIF members under the Oakar Amendment, § 1815(d)(3), and thus were BIF Oakar banks owing assessments to the SAIF. App. 8a, 34a. Barnett Bank's complaint therefore contended that, as a BIF member that had never engaged in a "conversion transaction," it was not subject to SAIF assessment under the Oakar Amendment.

The district court, applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), rejected the Bank's challenge to the FDIC's assessment on the ground that the agency's rule had "properly filled [a] gap" in the FDI Act because the Oakar Amendment had not provided for SAIF liabilities of BIF-member banks that acquired BIF Oakar banks. App. 37a. In doing so, the district court made no reference to the agency's explicit refusal to apply the plain language of the statute which limits the "conversion transactions" that give rise to a bank's SAIF assessments only to banks that resulted from mergers or consolidations between a BIF-member and a SAIF member.

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[4] *See also Branch Banking & Trust Co. v. FDIC*, 172 F.3d 317 (4th Cir. 1999); *Wells Fargo Bank, N.A. v. FDIC*, No. 00-1251 (CKK) (D.D.C. June 15, 2001) (dismissing the bank's complaint), on appeal No. 01-5280 (D.C. Cir.).

4. The Eleventh Circuit affirmed, albeit on a completely different rationale.[5] The court of appeals analyzed the case under *Chevron*, stating the issue as being

> [w]hether a regulation may be upheld based upon the agency's *Chevron* authority to resolve statutory ambiguities when the agency has stated upon issuance of the regulation that the statute was not ambiguous at all.

App. 2a. The panel recognized that the Bank's argument was that both it and the "Oakar banks" which had been previously acquired were members only of the BIF, and agreed that "if the Bank of America . . . did not engage in a covered Oakar conversion transaction [*i.e.*, one between a BIF member and a SAIF member] . . . there is no other statutory basis for imposing the SAIF assessments" that were challenged here. App. 12a n.5 (parenthetical omitted).

The court also acknowledged that "the FDIC never suggested that the source of its authority [to impose the challenged assessments] lay in the statute's ambiguity about

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[5] Bank of America's opening brief in the Eleventh Circuit argued that where Congress leaves an "explicit gap" in the statute, *Chevron*, 467 U.S. at 843, holds that the agency may fill that gap only through "legislative regulations," which operate prospectively. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988). *See also Mead*, 121 S. Ct. at 2171 (citing *Chevron*). The Bank argued that if the FDIC's rule is "interpretive" as labeled, it cannot fill a gap by imposing new legal requirements. Alternatively, if the rule is legislative, it cannot create retroactive liabilities. Bank of America also relied on *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986), for the proposition that an agency does not have the power to fill "gaps" by "correct[ing] flaws that it perceives in the statute it is empowered to administer." *See also Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995). Confronted with these arguments, the FDIC abandoned the "gap-filling" argument that succeeded in the district court and the court of appeals accordingly did not discuss it.

whether a BIF Oakar bank could also be an SAIF member," *id.* at 16a, quoting the language in the preamble to the FDIC's regulation set forth at pp. 4-5 above, which recognized that an Oakar bank is only a member of the BIF. The court further acknowledged that, rather than asserting any ambiguity in the statute or construing the term "member" as broad enough to make an Oakar bank a member of both the BIF and the SAIF, "the FDIC simply ignored the plain language of the statutory definition of 'conversion transaction' in favor of a more functional interpretation," *id.* at 17a – an approach which the panel characterized as "damn-the-statute-let's-be-functional . . . ," *id.* at 18a.

Recognizing that the FDIC's action could not therefore be upheld under the interpretation of the term "member" that it adopted when promulgating its rule, the court focused on "[t]he agency's current position [in the litigation] that the statute is ambiguous about whether a BIF Oakar Institution can be a member of both the BIF and the SAIF," App. 18a, so that "a BIF Oakar institution *can* be a member of both the BIF and the SAIF," *id.* (emphasis added). The court acknowledged that this is a "new interpretation of the statute [that] does appear to be post-hoc, or post-litigation, and is inconsistent with the position the agency took in the preamble to its regulation." *Id.* at 19a. It nonetheless deferred to the agency's "new," "post-hoc or post-litigation," interpretation, concluding that the "FDIC's interpretation of the statute" "was permissible under the highly deferential second step of the *Chevron* analysis." *Id.* at 25a.

REASONS FOR GRANTING THE WRIT

In light of this Court's decision in *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), which was handed down after the court of appeals had denied rehearing in this case, the Eleventh Circuit erred in deferring under *Chevron* to an agency interpretation of a statute offered for the first

time in litigation. *Mead* held that *Chevron* does not apply to most informal agency interpretations and specifically noted that *Chevron* deference is especially unwarranted for agency interpretations that are offered for the first time by the agency as party to litigation. *Id.* at 2172. Here the agency interpretation to which the Eleventh Circuit deferred was not only made for the first time in litigation, but also it contradicted the agency's definition of the disputed statutory term as expressed in notice-and-comment rulemaking, which receives the highest deference from courts.

1. In *Mead*, the Court concluded that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 121 S. Ct. at 2171. The Court then noted that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Id.* (citations omitted). In this regard, the Court found that an "interpretation advanced for the first time in a litigation brief" is accorded "near indifference" by reviewing courts. *Id.* at 2172.

In the aftermath of *Mead*, the Court summarily granted certiorari, vacated and remanded the decision in *Matz v. Household Int'l Tax Reduction Inv. Plan*, 227 F.3d 971 (7th Cir. 2000), *see* 121 S. Ct. 2545 (2001) (No. 00-1279), in circumstances far less egregious than those here. In *Matz*, the Seventh Circuit deferred to the position that the Internal Revenue Service expressed for the first time in an *amicus* brief which was quoted by the Second Circuit in an earlier opinion. *See* 227 F.3d at 974-75, citing *Weil v. Retirement*

Plan Admin. Comm. of the Terson Co., Inc., 933 F.2d 106, 110 (2d Cir. 1991) (on rehearing).

2. This case goes far beyond *Matz* in misapplying agency deference. The Eleventh Circuit found that the "FDIC's . . . interpretation of the statute" that a BIF Oakar bank could also be a member of the SAIF, thus constituting a conversion transaction making the resultant bank liable for SAIF assessments was "new," "post-hoc or post-litigation." App. 19a. It nonetheless deferred to agency counsel's litigation interpretation as "permissible under the highly deferential second step of the *Chevron* analysis." *Id.* at 25a.[6] The court of appeals acknowledged that "the FDIC first took this new position when it argued [a similar case, *see supra* n.4] before the Fourth Circuit," App. 18a, and that it was contrary to the position that the agency itself had advanced in the course of notice-and-comment rulemaking, *id.* at 16a-18a.

First, under *Mead*, the Court has indicated that it will require some evidence at the outset that "Congress . . . expect[ed] the agency to be able to speak with the force of law" before applying *Chevron*. 121 S. Ct. at 2172. Here, the FDIC's litigation position "present[s] a case far removed not only from notice-and-comment process, but from any other

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[6] The court of appeals' assertion that "Bank of America did not contest the second step [of *Chevron*] before us," App. 25a n.8, is entirely misplaced. The question before the court of appeals was whether the court should defer to the agency's interpretation of the term "member" as set out in the preamble to its regulation, not the agency's litigation position seeking to salvage the regulation. The court of appeals would never have gotten to the second step of the *Chevron* analysis, if it had agreed with the FDIC's interpretation of "member" in its rulemaking or if it had determined that *Chevron* deference to the agency's litigation position was unwarranted. Moreover, Bank of America strenuously argued below that the agency could not properly interpret a statute to achieve its goals when the agency acknowledged it could not reconcile its decision with the language of the statute. *See supra* n.5.

circumstances reasonably suggesting that Congress ever thought of [such litigation positions] as deserving" *Chevron* deference. *Id.* at 2173. In short, if *Mead* requires vacation of a court of appeals' decision when a court defers to an agency's interpretation of a statute advanced as an *amicus* in another case, as in *Matz*, *a fortiori* such a vacation is warranted where the agency advances its interpretation of the statute for the first time as a party to litigation *and* it directly contradicts the interpretation of a disputed statutory term adopted by the agency in prior notice-and-comment rulemaking.

Second, the Eleventh Circuit's decision applied *Chevron* deference to an agency litigating position even though it acknowledged that the FDIC had adopted a "damn-the-statute-let's-be-functional approach" in the notice-and-comment rulemaking. App. 18a. The court of appeals thereby justified the FDIC's application of § 1815(d)(3) to mergers and consolidations between a BIF member bank and a BIF Oakar bank, even though the agency confessed in the rule's preamble that it could not square that result with the plain language of the statute, *as the agency itself construed it*. Thus, the court of appeals condoned the agency's decision to re-write the FDI Act so that it would better serve policy ends as the FDIC perceived them and ignored this Court's decisions which condemn such agency attempts to rewrite legislation. *See Dimension Financial Corp.*, 474 U.S. at 374 (footnote omitted):

> The statute may be imperfect, but the [Federal Reserve] Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

> If the [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.

See also Newport News Shipbuilding, 514 U.S. at 135-36 ("[T]he proposition that the statute at hand should be liberally construed to achieve its purposes . . . . does not [permit the Director to] add features that will achieve the statutory 'purposes' more effectively.").

Third, *Mead* noted that agency "consistency," 121 S. Ct. at 2171, is one of the factors that courts should take into account in deciding whether to apply *Chevron*. In contrast to *Matz*, where there was no indication of agency inconsistency, here the court of appeals has expressly condoned the agency's change in position by according *Chevron* deference to a litigation position that conflicts with the agency's prior position taken in the process of notice-and-comment rulemaking.

3. By allowing the agency to change its interpretation of the FDI Act during litigation, the court of appeals permitted the FDIC to impose more than $28 million of the disputed SAIF assessments on Barnett Bank alone. App. 2a, 8a. Based on the FDIC's own estimates, there are nearly 100 other similar transactions involving assessments that the FDIC has imposed on BIF banks that have acquired BIF Oakar banks. 61 Fed. Reg. 34751, 34764 (cols. 2 & 3) (July 3, 1996). This Court's review is warranted to ensure that these vast sums are not collected by an agency based upon an application of its statute that defies settled principles of statutory construction and administrative law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and either hear this case on the merits or vacate the decision below, and remand this case for further consideration by the court of appeals.

Respectfully submitted,

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September 2001

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14863

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
an agency of the United States of America,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

D.C. Docket No. 97-00055 CIV-J-21-A

(March 23, 2001)

Before EDMONDSON, CARNES and COX, Circuit Judges.

CARNES, Circuit Judge:

This appeal concerns the validity of the Federal Deposit Insurance Corporation's regulation, codified as 12 C.F.R. § 327, which determines the insurance assessment rate applicable to the funds that result from the merger of a Banking Insurance Fund financial institution with a Banking Insurance Fund Oakar institution in certain circumstances. That specific question is one of those complicated and transitory regulatory banking issues that is of no immediate interest to anyone except those directly involved with it.

The FDIC is interested in the issue because it is the FDIC's regulation that is in question, Bank of America is interested because a lot of the Bank's money is involved, and we are interested because it is our duty to decide the issue. We publish this opinion explaining our decision because the same regulatory issue may come up between the FDIC and other banks, and also because our decision turns to some extent upon a *Chevron/Chenery* issue of first impression in this circuit which may arise in other administrative law cases in the future. That issue is whether *Chenery*'s prohibition on post-hoc agency arguments applies to arguments proffered under the first step of the *Chevron* analysis. More specifically, the issue is whether a regulation may be upheld based upon the agency's *Chevron* authority to resolve statutory ambiguities when the agency had stated upon issuance of the regulation that the statute was not ambiguous at all.

I. BACKGROUND

Bank of America filed an action under the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, against the Federal Deposit Insurance Corporation.[1] The Bank sought judicial review of the FDIC's determination that it owed the Savings Association Insurance Fund $28,000,000.00 in deposit insurance obligations on more than $3.7 billion of the Bank's deposits. Specifically, Bank of America sought a declaratory judgment that the FDIC's rate of deposit insurance assessments against it should have been determined solely on the basis of the Bank's

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[1] Barnett Bank was the original party to this suit. However, after the initiation of the present appeal, Bank of America acquired Barnett Bank. Accordingly, all of our references to the plaintiff will be to Bank of America.

membership in the Bank Insurance Fund, and not to any extent on the basis of the higher Savings Association Insurance Fund rate. The district court granted the FDIC's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and Bank of America brought the case here on appeal.

In 1989, Congress adopted the Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified at 12 U.S.C. § 1811 *et seq.*) ("FIRREA"). Among other things, FIRREA abolished the Federal Savings and Loan Insurance Corporation and shifted its deposit insurance functions to the FDIC. *See* 12 U.S.C. § 1811 *et seq.* ("FIRREA"). FIRREA established two separate deposit insurance funds within the FDIC: the Bank Insurance Fund ("BIF"), to cover the deposits of commercial banks; and the Savings Association Insurance Fund ("SAIF"), to cover the deposits of savings and loan associations.[2] *See id.* § 1821(a)(5)-(6). To replenish the SAIF, which had been depleted by the failure of numerous savings and loan institutions in the 1980's, FIRREA imposed higher deposit premiums on SAIF member institutions than on BIF member institutions. *See generally id.* § 1817.

In order to prevent banks' evasion of the higher SAIF rate of assessment by the transfer of deposits from SAIF institutions to BIF institutions, Congress imposed several control measures. Of central importance to the present case was the five-year moratorium on inter-fund transfers, beginning on August 9, 1989, and the restrictions that applied during those five years. *See id.* § 1815(d)(2)(A)(ii). During

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[2] A more complete history of the development of the contemporary two-fund deposit insurance scheme is contained in *Branch Banking & Trust Co. v. F.D.I.C.*, 172 F.3d 317, 319-21 (4th Cir. 1999), and *Great W. Bank v. Office of Thrift Supervision*, 916 F.2d 1421, 1423-24 (9th Cir. 1990).

the period of the moratorium, FIRREA limited the ability of depository institutions to engage in "conversion transactions" between BIF institutions and SAIF institutions. FIRREA defines the term. "conversion transaction" as:

> (i) the change of status of an insured depository institution from a Bank Insurance Fund member to a Savings Association Insurance Fund member or from a Savings Association Insurance Fund member to a Bank Insurance Fund member;
>
> (ii) the merger or consolidation of a Bank Insurance Fund member with a Savings Association Insurance Fund member;
>
> ***
>
> (v) the transfer of deposits -
>
> (I) from a Bank Insurance Fund member to a Savings Association Insurance Fund member;
>
> ***

Id. § 1815(d)(2)(B). In this case we are concerned primarily with section 1815(d)(2)(B)(ii): "the merger or consolidation of a Bank Insurance Fund member with a Savings Association Insurance Fund member."

Congress included a limited number of exceptions to the moratorium on conversion transactions, the most important of which is contained in the so-called Oakar Amendment.[3]

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[3] In addition to the conversion transactions authorized by the Oakar Amendment, institutions could also engage in conversion transactions that either (1) affected an insubstantial portion of the total deposits of each institution; or (2) that occurred in connection with the acquisition of a failing SAIF institution or a failing BIF institution, if the FDIC determined that the loss of assessments to the fund from which the

(continued...)

See id. § 1815(d)(3). The Oakar Amendment permitted the FDIC to approve conversion transactions between an SAIF institution and a BIF institution if the institution resulting from the transaction assumed continuing responsibility to make deposit insurance payments to the SAIF. *See id.* § 1815(d)(3)(B). The resulting bank is commonly known as an "Oakar institution" or an "Oakar bank."

If the acquiring bank was a BIF-insured institution, then the resulting BIF Oakar institution would have to pay deposit insurance premiums both to its primary fund, BIF, and to its secondary fund, SAIF. *See id.* § 1815(d)(3)(B)(i). The resulting institution is commonly referred to as a "BIF Oakar institution" in order to differentiate it from an "SAIF Oakar institution," which resulted when the acquiring bank was insured by the SAIF. *See id.* § 1815(d)(3)(B)(ii). The amount of deposit insurance premiums that the BIF Oakar institution paid to its secondary fund, *i.e.*, to the SAIF, was determined by reference to its "adjusted attributable deposit amount" ("AADA"). The AADA is equal to at least the value of all of the deposits acquired from the SAIF institution. *See id.* § 1815(d)(3)(C). Essentially, the amount of insurance premiums an Oakar institution had to pay to the two funds was equivalent to the relative portions of BIF-insured and SAIF-insured deposits at the time of the conversion transaction. *See generally id.* § 1815(d)(3)(B), (D); *Branch Banking & Trust Co. v. F.D.I.C.*, 172 F.3d 317, 322 (4th Cir. 1999).[4] The Oakar Amendment also provided

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(footnote continued)

institution was departing was outweighed by the financial benefits to that fund. *See* 12 U.S.C. § 1815(d)(2)(C)(i)-(iii). Institutions participating in a conversion transaction pursuant to either of these exceptions were required to pay both an "exit" fee to the insurance fund being exited and an "entrance" fee to the fund being entered. *See id.* § 1815(d)(2)(E).

[4] The Oakar Amendment also provided that upon expiration of the moratorium, an Oakar institution would be permitted to convert all of its (continued...)

that the amount of SAIF assessments determined in accordance with section 1815(d)(3)(B)(i), the provision applicable to BIF Oakar institutions, "shall be deposited in the [SAIF]." *Id.* § 1815(d)(3)(D)(i).

Following the enactment of the Oakar Amendment, it was not immediately clear how the FDIC would treat a transfer of deposits between a BIF Oakar institution and an ordinary BIF member bank. Specifically, there was a question as to whether the FDIC would continue to assess the BIF bank at the SAIF rate for that portion of the deposits the bank had acquired from the Oakar institution which were SAIF assessable prior to the transfer.

The FDIC answered that question in an interpretive letter issued in 1990 which became known as the Rankin letter. *See* FDIC Advisory Op. 90-22 (June 15, 1990). The FDIC stated in the letter that an Oakar institution which transfers its deposits will be considered to have transferred its primary fund deposits first and then, when the primary fund deposits are exhausted, to have transferred its secondary fund deposits. In more technical language, the Rankin letter spelled out the FDIC's position this way: "if the aggregate of all deposits transferred to BIF-member banks reduces the Oakar bank total deposit base below the amount of its [AADA], any subsequent deposit transfer by the Oakar bank to another BIF-member bank would be regarded as a conversion transaction . . . ." *Id.*

In December of 1996, the FDIC published a final regulation codifying the FDIC's position, previously set forth in the Rankin letter, regarding deposit transfers by BIF Oakar institutions to BIF institutions. *See* 61 Fed. Reg. 64,960,

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(footnote continued)

deposits to its primary fund upon payment of entrance and exit fees. *See* 12 U.S.C. § 1815(d)(3)(H)(ii).

64,962 (Dec. 10, 1996) (codified at 12 C.F.R. § 327 (1997)). The regulation provides that if a BIF institution merges with a BIF Oakar institution, and in the merger the BIF Oakar institution transfers all of its primary fund deposits, then "[to] the extent that the aggregate volume of deposits that is transferred . . . exceeds the volume of deposits that is insured by its primary fund immediately prior to the transaction . . . the . . . deposits so transferred shall be deemed to be insured by the institution's secondary fund . . . ." 12 C.F.R. § 327.37(a)(2). After such a transaction, "[t]he deposits [held by the resulting institution] shall be deemed . . . to be insured by the same fund or funds in the same amount or amounts as the deposits were so insured immediately prior to the transaction." *Id.* § 327.37(b). That means a transfer of deposits from a BIF Oakar institution to another BIF bank would be considered a covered Oakar conversion transaction to the extent that the deposits transferred exceed the Oakar bank's primary fund deposits. The resulting institution would continue to pay SAIF assessments on the original amount of the AADA transferred by the BIF Oakar institution. In other words, the obligation the BIF Oakar institution was under to pay the higher SAIF rate on some of its funds could not be washed out by merging it into a BIF institution.

In late 1996, Congress authorized a one-time "special assessment on the SAIF-assessable deposits of each insured depository institution [that would] cause the [SAIF] to achieve the designated reserve ratio on [October 1, 1996]." Economic Growth and Regulatory Paperwork Act of 1996, Pub. L. No. 104-208, § 2702(a), 110 Stat. 3009-479 to 3009-480 (Sept. 30, 1996) ("EGRPA"). With the reserve ratio achieved, the moratorium on conversion transactions was lifted on the same date. As a result of the recapitalization, SAIF and BIF premiums have been set at the same level since October 1, 1996. That fact does not moot this case,

because this case involves assessments that arose before that date.

In mid-1996, Bank of America acquired through merger 29 sister bank subsidiaries of its parent holding company. Prior to the merger, Bank of America was a BIF member bank that had never engaged in an Oakar transaction. However, 17 of the banks that Bank of America acquired in the merger were themselves BIF Oakar institutions with AADA's assessed at the higher deposit-insurance rate paid by SAIF members.

On August 29, 1996, approximately three months before the publication of its final rule, the FDIC notified Bank of America that it would be assessing SAIF premium fees on more than $3.7 billion of deposits corresponding to the AADA's that had been previously reported by the 17 BIF Oakar institutions prior to their acquisition by Bank of America. As a result, the FDIC informed Bank of America that it owed two SAIF quarterly payments in the amounts of $1,440,251.65 and $2,163,237.98. In addition, the FDIC's attribution of AADA's to Bank of America caused the agency to impose the EGRPA one-time special assessment on these deposits in the amount of $25,296,967.00.

Bank of America filed suit under the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, against the FDIC on the grounds that the SAIF assessments were beyond the agency's authority because they were contrary to the plain meaning of the Federal Deposit Insurance Act. The Bank sought a declaratory judgment that the FDIC's rate of assessments should be determined solely on the basis of Bank of America's membership in the BIF, and that the FDIC's assessment of a portion of the Bank's deposits at the SAIF rate was unlawful. The FDIC filed a motion to dismiss, arguing that the interpretive rule contained in its regulation, which permits the agency to assess Bank of

America's deposits in the way it did, is valid. The district court granted the FDIC's motion to dismiss, finding that the Federal Deposit Insurance Act was ambiguous and that the Agency's interpretive rule "properly filled [a] gap" in the statute.

II. DISCUSSION

In *Chevron, U.S.A.. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), the Supreme Court established the analytical framework for judicial review of an administrative agency's interpretation of a statute. The reviewing court must first establish whether the intent of Congress is clear from the statute. If it is, that intent controls, and the inquiry is over. *Id.* at 842-43, 104 S. Ct. 2781. If, however, the reviewing court determines that the statute is ambiguous, the question becomes whether the agency's resolution of the ambiguity is based on a permissible construction of the statute. *Id.* at 843, 104 S. Ct. 2781-82. We turn now to the first question: whether the Federal Deposit Insurance Act is ambiguous in regard to how funds transferred from a BIF Oakar institution to an ordinary BIF institution should be treated for insurance fund assessment purposes.

A. STATUTORY CONSTRUCTION

1. Bank of America's Position

Bank of America asserts that there is only one dispositive issue on appeal, and that is whether the merger between it and the 17 BIF Oakar banks is a conversion transaction under the Federal Deposit Insurance Act. Bank of America's position is centered on the language in sections 1815(d)(2) and (3), which defines "conversion transaction" as a transaction occurring between a BIF "member" and an SAIF "member." According to Bank of America, a merger between itself, a BIF bank, and a BIF Oakar institution could not satisfy the statutory definition of conversion transaction

because a BIF Oakar bank is not technically an SAIF "member." A BIF Oakar bank is not an SAIF member, Bank of America insists, because of what section 1815(d)(3)(B)(i) of the Act says.

That provision, which is part of the Oakar Amendment, specifies that when "an acquiring, assuming, or resulting depository institution . . . is a [BIF] member . . . [a portion of its deposits] shall be *treated as* deposits which are insured by the [SAIF]." 12 U.S.C. § 1815(d)(3)(B)(i) (emphasis added). Bank of America argues that language must mean the resulting BIF Oakar institution is a member of only the Bank Insurance Fund. The language must mean that, the bank says, because while the statute defines an SAIF member as a "depository institution the deposits of which are insured by [SAIF]," *id.* § 1817(l)(5), the language in section 1815(d)(3)(B)(i) refers to a BIF Oakar institution as having deposits that are only "treated as" insured by SAIF, not as an institution whose deposits "are insured by" the SAIF.

As further support for its argument that the FDIC's regulation is inconsistent with the unambiguous language of the statute, Bank of America contends that the regulation has altered the statutory method for computing the AADA. The statute provides, in essence, that the AADA should be equivalent to "the amounts of any deposits acquired by the institution." 12 U.S.C. § 1815(d)(3)(C)(i). The regulation, on the other hand, provides that the AADA should be equivalent to "the aggregate amount of the transferred deposits minus that portion thereof that is equal to the institution's primary-fund deposits." 12 C.F.R. § 327.37(a)(2). Bank of America's argument on this point is that the statutory method of computing the AADA indicates that conversion transactions were only intended to encompass deposit exchanges between BIF members and SAIF members.

In a statutory Oakar transaction (between a BIF member and a SAIF member), the acquiring institution would acquire nothing but SAIF-insured deposits. Therefore, Bank of America says, it makes sense to define the size of the AADA by "the amounts of any deposits acquired by the institution," § 1815(d)(3)(C)(i), which is exactly what the statute does. On the other hand, in a regulatory Oakar transaction (between a BIF member and a BIF Oakar institution), the acquiring institution would acquire both BIF-insured deposits and SAIF-insured deposits, so it is necessary to subtract "that portion . . . that is equal to the [Oakar institution's] primary fund deposits." 12 C.F.R. § 327.37(a)(2). Bank of America argues that the fact the statutory method for computing the AADA did not provide a method for differentiating between SAIF and BIF insured deposits acquired in a conversion transaction is evidence that for the regulation to include such transactions as Oakar conversion transactions goes beyond and is inconsistent with the statutory definition of Oakar conversion transactions.

Finally, Bank of America argues that the FDIC itself has always taken the position that an Oakar bank, though a portion of its deposits are treated as insured by the SAIF, is still a "member" of only the BIF. *See* Preamble to the Final Rule, 61 Fed. Reg. 64,960, 64,962 (Dec. 10, 1996) ("[t]he FDIC accepts the proposition that an Oakar institution is a member of its primary fund only, and is not a member of its secondary fund even though it holds secondary-fund deposits.").

Based on all of these arguments, Bank of America asserts that the language of the statute clearly indicates that a merger of a BIF bank and BIF Oakar institution cannot satisfy the statutory definition of a conversion transaction because both institutions are members of the BIF only. If no conversion

transaction occurred when Bank of America merged with the Oakar banks, none of its deposits can be subject to assessment at the SAIF rate.[5] Accordingly, Bank of America argues that this Court should not defer to the FDIC's interpretation of the statute under the first step of the *Chevron* analysis, because the agency's interpretation expressed in the regulation is contrary to the unambiguous mandate of the statute.

2. The Fourth Circuit's Construction

The Fourth Circuit recently decided a case that presented precisely the same issues that are before us here. *See Branch Banking & Trust Co. v. F.D.I.C.*, 172 F.3d 317 (4th Cir. 1999). In rejecting arguments identical to those Bank of America has made to us, the Fourth Circuit reasoned the "provision stating that a resulting BIF Oakar institution merely holds deposits treated as insured by SAIF creates an ambiguity as to whether the resulting BIF Oakar institution is, in addition to being a member of BIF, a *member* of SAIF."[6] *Id.* at 327 (emphasis in original). The Court then

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[5] As Bank of America pointed out in the district court, BIF or SAIF assessments are made solely on the basis of a financial institution's membership in one fund or another, with the limited exception of the Oakar Amendment. Thus, if Bank of America's interpretation of the Oakar Amendment is correct (meaning that Bank of America did not engage in a covered Oakar conversion transaction and cannot be assessed SAIF fees on any of its newly acquired deposits), there is no other statutory basis for imposing the SAIF assessments on it.

[6] The Fourth Circuit based its finding of ambiguity on the following analysis: the prohibition on inter-fund transfers, 12 U.S.C. § 1815(d)(3)(E)(ii), seems to indicate that after an Oakar transaction, the resulting Oakar institution must be a member of both the BIF and the SAIF (because if the resulting institution holds BIF-insured, as well as SAIF-insured deposits, then no inter-fund transfer actually took place. In other words, rather than interpret an Oakar conversion as resulting in the transfer of SAIF-insured deposits from a SAIF-insured institution to an exclusively BIF-insured institution, under the Fourth Circuit's (continued...)

concluded that the ambiguity as to whether an Oakar institution could be considered an SAIF member rendered the definition of conversion transaction unclear as it applies to transactions between BIF institutions and BIF Oakar institutions, which gave the FDIC leeway to regulate as it did. *Id.* Although we reach the same result as the Fourth Circuit, we get there by a different route.

3. Our Analysis of the Statute

The first step under the *Chevron* analysis is to examine the statute in order to determine whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781. The resolution of this threshold inquiry will be at least influenced, if not determined, by how broadly we frame the "precise question." We agree with the Fourth Circuit's framing of that question:

> [W]hether a transaction whereby a BIF member institution merges with a BIF Oakar institution (an Oakar institution that is a member of BIF, its primary fund, but that holds deposits that are treated as insured by SAIF, its secondary insurance fund) is a "conversion transaction" under the Oakar Amendment such that the acquiring institution is required to pay insurance to both BIF and SAIF in accordance with the deposits being

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(footnote continued)

interpretation, one institution now holds deposits insured by both funds). However, the language contained in the assessments provision belies that interpretation, because it says that a portion of the deposits of a BIF Oakar institution are to "*be treated* as deposits which are insured by the [SAIF]." *Id.* § 1815(d)(3)(B)(i) (emphasis added). Thus, according to the Fourth Circuit, it is not clear whether a BIF Oakar institution merely holds deposits treated as insured by SAIF, or is in fact insured by the SAIF in addition to being insured by the BIF. *Id.* at 327.

> insured or treated as insured by each fund at the time of the acquisition.

Branch Banking & Trust, 172 F.3d at 326 (emphasis in original). Did Congress in the statute speak to that precise issue?

There are two statutory provisions upon which Bank of America primarily relies: the definition of an Oakar institution as a BIF institution that has deposits "treated as deposits which are insured by the [SAIF]," 12 U.S.C. § 1815(d)(3)(B)(i); and the statutory method for computing the AADA, which is arguably inconsistent with the method the FDIC prescribed in the regulation, *see id.* § 1815(d)(3)(C)(i). We agree with Bank of America that these two provisions *suggest* that a BIF Oakar institution is not also a member of the SAIF. However, nothing in either of these provisions necessarily compels such a conclusion. In other words, nothing in either provision speaks "directly" – as *Chevron* puts it – to that precise question.

Bank of America also relies heavily on the FDIC's prior position, stated in the preamble to the regulation, that a BIF Oakar institution is definitely not a member of the SAIF. *See* Preamble to the Final Rule, 61 Fed. Reg. 64,960, 64,962 (Dec. 10, 1996). However, as we will explain later in this opinion, the FDIC's prior construction of the statute is not relevant under the first step of the *Chevron* analysis. And that is a fundamental flaw in Bank of America's argument. The principal support for Bank of America's construction of the statute as clearly precluding a BIF Oakar institution from also being a member of the SAIF is the FDIC's previous statements to that effect. If we remove those statements from the analysis and focus exclusively on the relevant statutory provisions, Bank of America does not have a strong argument.

The primary source of statutory ambiguity stems from a provision that received little attention from either the parties

in this case or the Fourth Circuit in its *Branch Banking & Trust* opinion. That statutory provision provides that both funds will be liable for costs in the event that an Oakar institution defaults, with each fund being liable in proportion to the "amount of insured deposits of such acquiring, assuming, or resulting depository institution assessed by the [BIF] and the [SAIF], respectively, under [§ 1815(d)(3)(B)(i)]." *See* 12 U.S.C. § 1815(d)(3)(G). Thus, an Oakar institution pays insurance premiums to the SAIF on its AADA deposits, *id.* § 1815(d)(3)(D)(i), and the SAIF – and not the BIF – is exclusively liable to the extent of those deposits. Construing sections 1815(d)(3)(G) and 1815(d)(3)(D)(i) together, an Oakar bank's AADA deposits are "treated" like they are insured by the SAIF to such an extent that it appears as though they are in fact insured by the SAIF. We do not see (and counsel for Bank of America could not point out at oral argument) any difference at all between the way an Oakar bank's AADA deposits are "insured" by the SAIF and the way its BIF deposits are "insured" by the BIF.

Here is our point. Under the statute, a BIF Oakar institution holds some funds that are in every meaningful way and effect insured by the SAIF, and it holds other funds that are in every meaningful way and effect insured by the BIF. The statute defines an SAIF member institution as one whose funds "are insured by the [SAIF]," *id.* § 1817(1)(5), and it defines a BIF member institution as an institution whose funds "are insured by the [BIF]," *id.* § 1817(l)(4). Under these provisions and definitions, an Oakar institution can be a "member" of both funds. Thus, there is an ambiguity in the statute. That ambiguity exists because the provisions we have just discussed point in one direction (an Oakar institution being a member of both funds), while the provisions the Bank of America relies upon point in the other direction (an Oakar institution being a member of only the Banking Insurance Fund).

So, although we have taken a different route than the Fourth Circuit did in *Branch Banking & Trust*, we have arrived at the same conclusion as it did regarding the first step of the *Chevron* analysis: the statute is ambiguous about whether the merger of a BIF member institution with a BIF Oakar institution is a "conversion transaction" under the Oakar Amendment; Congress did not speak directly and unambiguously to that precise issue.

B. THE FDIC's INCONSISTENT POSITIONS

Before moving on to the second step of the *Chevron* analysis, we need to address another of Bank of America's arguments relevant to the first step, an argument which goes to the validity of the regulation and the FDIC's position on appeal. Bank of America makes much of the fact that, on appeal, the FDIC points to a different, and indeed antithetical, source of authority for adopting the interpretation of the Oakar Amendment than it did in the regulation. In the preamble to the regulation, the FDIC addressed a number of concerns that arose during the notice and comment period. Some commentators had suggested that the FDIC lacked the statutory authority to interpret the Oakar Amendment as it had in the Rankin Letter. In response, the FDIC never suggested that the source of its authority lay in the statute's ambiguity about whether a BIF Oakar bank could also be an SAIF member. To the contrary, the FDIC stated:

> The FDIC accepts the proposition that an Oakar institution is a member of its primary fund only, and is not a member of its secondary fund even though it holds secondary-fund deposits . . . [T]he original version of the Oakar Amendment . . . made it abundantly clear that a BIF-member bank continued to be a BIF member after acquiring deposits from a SAIF member in an Oakar

> transaction . . . . The FDIC holds this view today.

Preamble to the Final Rule, 61 Fed. Reg. 64,962 (Dec. 10, 1996). Bank of America charges that instead of taking the position that the term "member" was ambiguous, the FDIC simply (in the Bank's words) "nullified the 'membership' requirement in the statutory definition of a 'conversion transaction.'"

Bank of America's argument is not without force. In support of the FDIC's position that it had the authority to promulgate the regulation at issue, the agency never once suggested that the term "membership" or any other provision of the statute was ambiguous. Instead, the FDIC simply ignored the plain language of the statutory definition of "conversion transaction" in favor of a more functional interpretation. As the FDIC stated in the preamble to the regulation:

> [T]he FDIC also takes the position that nominal fund membership is not the touchstone for determining whether a transaction is a conversion transaction within the meaning of [12 U.S.C. § 1815(d)(2)], and accordingly does not determine whether a transaction comes within the scope of the Oakar Amendment.

Id. Instead, the term "membership," according to the agency's original position, is only a "label that denotes the formal relationship of an insured institution to the FDIC as an insurer within the context of the two-fund system." *Id.* The FDIC declared that instead of looking to fund membership it would look to the "substance of the relationship" between the Oakar institution and the FDIC as insurer in order to determine whether the transaction is a conversion transaction. *Id.* at 64,693. The agency said that it was giving the "label 'member' . . . only that degree of

significance that is appropriate to preserve the integrity of the two-fund structure." *Id.*

In this appeal the FDIC appears to have abandoned its initial, damn-the-statute-let's-be-functional approach, in favor of its current, more persuasive position. The agency's current position is that the statute is ambiguous about whether a BIF Oakar institution can be a member of both the BIF and the SAIF, and the existence of that ambiguity authorizes the FDIC to issue an interpretive regulation setting out its functional approach.

Apparently, the FDIC first took this new position when it argued before the Fourth Circuit in *Branch Banking & Trust*. With respect to that decision, Bank of America argues it was "improper for the FDIC to contradict the position that it took in its rulemaking, and the Fourth Circuit should not have relied upon the agency's litigation-induced construction of the statute."[7] In support of that argument, Bank of America cites *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 459 (1943), which held that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." Bank of America argues that the Fourth Circuit erred in deferring to the FDIC's current interpretation of the Federal Deposit Insurance Act – that the statute is ambiguous as to whether a BIF Oakar institution is a member of both the BIF and the SAIF – because the FDIC had previously disavowed that interpretation. Instead of deferring to the agency's litigation-

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[7] Bank of America also argues that it appeared as though the Fourth Circuit reached its conclusion "without any apparent awareness of" the FDIC's conflicting views. However, since the Fourth Circuit quoted extensively from the preamble of the regulation, *see Branch Banking & Trust*, 172 F.3d at 323-324, we think it had to have been aware of the FDIC's change in position. Apparently, the Fourth Circuit simply chose not to address that aspect of the case.

induced interpretation of the statute, the Bank would have us hold the FDIC to its original position and evaluate the validity of the regulation, as well as the agency's authority to promulgate it, without regard to the FDIC's "new" statutory interpretation.

The problem with Bank of America's argument is that, while the FDIC's new interpretation of the statute does appear to be post-hoc, or post-litigation, and is inconsistent with the position the agency took in the preamble to its regulation, those characteristics do not have any legal significance on the issue of whether the statute is ambiguous under the first step of the *Chevron* analysis. There is no support in either *Chenery* or its progeny for the proposition that *Chenery*'s prohibition on post-hoc rationales should apply to agency arguments proffered under the first step of the *Chevron* analysis. It is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation.

We have found only a handful of decisions applying the *Chenery* principle in the context of a *Chevron* analysis. Most of those decisions apply *Chenery* during analysis involving *Chevron*'s second step, while the court was examining an agency's resolution of the statutory ambiguity in order to determine whether that resolution was based on a permissible construction of the statute. *See America's Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 835 (D.C. Cir. 2000) (holding that a post-hoc rationale alone could not support the agency's interpretation of a statute under the second prong of *Chevron*, stating that the *Chenery* principle "applies . . . to our review of statutory interpretations under the second prong of *Chevron*"); *Environmental Def. Fund. Inc. v. Administrator of U.S. E.P.A.*, 898 F.2d 183, 189 (D.C. Cir. 1990) (refusing to consider EPA's post-hoc rationalization for its proffered interpretation of the statute under the second step of the *Chevron* analysis); *Railway Labor Executives Ass'n v.*

Interstate Commerce Comm'n, 784 F.2d 959, 974 (9th Cir. 1986) (refusing, under the second step of *Chevron*, to consider arguments in support of the agency's interpretation of the statute that the agency had not stated contemporaneously with its issuance of the orders in question). That is the proper place for *Chenery* considerations to come into the *Chevron* analysis.

A few decisions have addressed the question of whether the *Chenery* principle applies to agency post-hoc rationalizations involving the kind of pure questions of statutory analysis that are involved under the first prong of the *Chevron* analysis. All of those decisions conclude that it does not. *See Arkansas AFL-CIO v. Federal Communications Comm'n*, 11 F.3d 1430, 1440 (8th Cir. 1993) (rejecting contention that *Chenery* applies to pure question of statutory construction, stating, "the Supreme Court clearly limited *Chenery* to situations in which the agency failed to make a necessary determination of fact or of policy . . . . The codification question we face involves neither a determination of fact nor a determination of policy") (internal citation and quotation omitted); *Railway Labor Executives' Ass'n*, 784 F.2d at 969 ("Generally, a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency . . . . However, the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute.") (internal citation omitted); *North Carolina Comm'n of Indian Affairs v. United States Dep't of Labor*, 725 F.2d 238, 240 (4th Cir. 1984) ("We do not . . . perceive there to be a *Chenery* problem in the instant case because the question of interpretation of a federal statute is not a determination or judgment which an administrative agency alone is authorized to make.") (citation and quotation omitted). We think that the Fourth, Eighth, and Ninth Circuits got it right in those decisions: the *Chenery* principle does not apply to agency

justifications or positions put forward under the first step of the *Chevron* analysis.

The Supreme Court articulated the basis of the *Chenery* principle as follows:

> [W]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.

Chenery, 318 U.S. at 88, 63 S. Ct. at 459. Under the first step of the *Chevron* analysis, we undertake an independent analysis of the statute in order to determine whether Congress has spoken directly to the precise issue before the agency. That inquiry does not involve, in *Chenery*'s terms, a "determination of policy or judgment which the agency alone is authorized to make." *Id.* To the contrary, as the Supreme Court stated in *Chevron*:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843 n.9, 104 S. Ct. at 2781-82 n.9 (citations omitted). Put another way, it is ultimately the function of the judiciary, not the administrative agency, to decide whether

Congress spoke directly to the issue in question. *See id.*, at 843 n.9, 104 S. Ct. at 2782 n.9 ("The judiciary is the final authority on issues of statutory construction . . ."); *Gulf Power Co. v. Federal Communications Comm'n*, 208 F.3d 1263, 1272 (11th Cir. 2000) ("Under *Chevron* step one, we determine whether Congress has spoken unambiguously to the question at issue."); *National Mining Assoc. v. Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) ("when applying *Chevron*'s first step, we do not need to defer when the issue is a 'pure question of statutory construction'").

We have found only one decision that has applied *Chenery* during the first step of a *Chevron* analysis. In *The Business Roundtable v. Securities and Exchange Comm'n*, 905 F.2d 406, 407 (D.C. Cir. 1990), the issue was whether the agency had exceeded its jurisdiction when it promulgated a regulation impacting the rules of self-regulatory organizations. The relevant provision of the Securities Exchange Act establishing the limits of the SEC's jurisdiction provided that the SEC could amend the rules of a self-regulatory organization if it was in furtherance of the purposes of the Act. *See id.* at 408-09. The SEC pointed to a number of provisions of the Exchange Act, arguing that each revealed a "purpose" of the Act that the new rule could be said to be "in furtherance" of. *See id.* at 410-16. The court rejected the SEC's arguments and decided, under *Chevron* step one, that the Exchange Act could not be read as granting the SEC jurisdiction to promulgate the rule at issue in that case. *Id.* at 417. The court concluded its opinion by stating: "Even if other statutory provisions could support the Commission's asserted authority, we cannot supply grounds to sustain the regulations that were not invoked by the Commission below." *Id.* at 417 (footnote omitted) (citing *Chenery*).

The *Business Roundtable* decision is distinguishable from this case. There, the court rejected the possibility of a post-hoc suggestion that an entirely different statute could support

the agency's action, *see id.* n.10 ("Some commentators argued that the Commission could ground its authority in the Williams Act, § 14(d)-(f), 15 U.S.C. § 78n(d)-(f)"). Here, by contrast, the agency's post-hoc rationale involves a different construction of the same statute. The distinction is important.

An administrative agency should attempt to conduct its actions, whether they be rulemaking or adjudication, within the statutory limits that Congress has placed on its authority. At the same time, an agency should have the opportunity to take full advantage of that authority, and to do so the agency must be able to recognize its outer limits. However, when, as was the case in *Business Roundtable*, the agency so fundamentally misunderstands the source of its authority (assuming it had any to begin with) that it purports to rely on the wrong statute, then any action taken by the agency pursuant to that statute would presumably not utilize a Congressional grant of authority. In such a case, the proper remedy is not to adopt the agency's litigation-induced rationale, but to vacate the agency action and allow the agency to take full advantage of the "new" or "actual" basis of its authority, if there be one. *See* Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking under Chevron*, 6 ADM. L.J. AM. U. 187 (1990) ("Where an agency underestimates its freedom of movement, the proper relief is to remand to the agency, not to uphold the agency action. This reflects not only standard principles of administrative law settled since *Chenery* . . . but also the basic theory of *Chevron*, which is that agencies should be left free to make policy determinations where Congress has not.") (footnote omitted).

As the court in *Business Roundtable* noted, even if it had been persuaded that a different statute would have provided the agency with authority to act as the agency did, "a change in the jurisdictional basis would almost certainly alter the substantive content of the final regulations." *See Business Roundtable*, 905 F.2d at 417; *see also Women Involved in*

Farm Econ. v. U.S. Dep't of Agric., 876 F.2d 994, 998-99 (D.C. Cir. 1989) ("By adopting a specific argument in support of agency action offered by counsel in the litigat[ion] process – but not relied on by the agency – the courts might actually restrict improperly the agency's future freedom of action to make policy under a particular statute.").

No such concerns are present in this case. There has been no "change in the jurisdictional basis" for the agency action. Moreover, while the FDIC did not originally believe that the statute was ambiguous, the agency's basis for adopting the regulation is entirely consistent with the basis of our holding. The original grounds the FDIC identified for promulgating the regulation was that nominal fund membership did not determine whether a conversion transaction had taken place; instead, the FDIC would look to the substance of the relationship between the Oakar institution and the FDIC as insurer. Similarly, our conclusion is that the statute is ambiguous in part because the "substance of the relationship" between an Oakar institution and the two funds to which it pays insurance premiums makes it seem as though it is insured by (and thus a member of) both funds. Because the basis for the FDIC's interpretation of the source of its authority to adopt the regulation and our subsequent interpretation are substantively the same, there is no risk that the FDIC "underestimate[d] its freedom of movement" under the FDI Act.

One additional consideration supports our conclusion. Our decision is only that the statute is ambiguous about whether an Oakar institution is a "member" of both the SAIF and the BIF. The FDIC remained (and remains) free to exercise its power to make policy judgments and interpret that ambiguity as it deems appropriate, so long as its interpretation is permissible under the second step of the *Chevron* analysis. *See Herz*, *supra* ("One concern underlying the *Chenery* rule is that to uphold an agency action on a ground invented by Department of Justice lawyers or the

court itself could lock the agency into a position that it had never in fact espoused and with which it disagrees. This concern is present only if the court's ruling results in final and binding conclusions of law. If the conclusion of the court is, as in *Chevron*, that the agency was free to do what it did, but was and is also free to do the opposite, then the court is not limiting agency options."). Thus, there is no risk that our decision "might actually restrict improperly the agency's future freedom of action to make policy under a particular statute." *See Women Involved in Farm Econ.*, 876 F.2d at 999.

Chenery's prohibition on litigation-induced, post-hoc rationalizations does not apply here, and the fact that the FDIC identified a different source of its perceived authority to adopt the regulation is of no moment under the first prong of *Chevron*.

C. CHEVRON STEP TWO

We agree with the Fourth Circuit that the FDIC's interpretation of the statute, which is embodied in the regulation, was permissible under the highly deferential second step of the *Chevron* analysis.[8] *See Branch Banking & Trust*, 172 F.3d at 327-29. As the Fourth Circuit stated:

> We find the FDIC's interpretation consistent with the purpose and intent of FIRREA as a whole – to recapitalize the failing FSLIC-insured institutions – and the purpose of the Oakar Amendment – allowing certain conversion transactions between institutions that are BIF members and SAIF members, while protecting SAIF by requiring the

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[8] Bank of America did not contest the second step before us, instead aiming all of its argument at the first step.

> resulting institution to continue to pay assessments to SAIF.

Id. at 328.

Moreover, despite the fact that the FDIC has taken inconsistent positions on the basis for its authority to adopt the interpretive regulation at issue, the policy reflected in the regulation itself, embodied originally in the Rankin letter and later in the regulation, has always remained consistent. Specifically, the FDIC determined that Congress intended to protect the SAIF by ensuring either: (1) that no SAIF-insured institution switched to the BIF (as reflected in the moratorium on conversion transactions), or (2) that an SAIF institution that engaged in an Oakar conversion transaction would continue to pay SAIF assessments until the moratorium was lifted. This interpretation by the FDIC involved "[t]he power of an administrative agency to administer a congressionally created . . . program" and it "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782 (citation and quotation omitted).

III. CONCLUSION

We **AFFIRM** the district court's dismissal of Bank of America's claim.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA,
JACKSONVILLE DIVISION

BARNETT BANK, N.A.,
a national banking association,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
an agency of the United States of America

Defendant.

Case No. 97-55-CIV-J-21-A

ORDER

Before NIMMONS, District Judge.

This cause comes before the Court on Defendant's Motion to Dismiss (Dkt. 9), Plaintiff's Memorandum (Dkt. 13) in opposition thereto, and various Notices and Responses to Notices (Dkts. 22, 23, 33, 34, 35, & 39) filed by the parties, as well as Plaintiff's Request for Briefing and Oral Argument, etc. (Dkt. 36) and Defendant's Opposition (Dkt. 38) thereto.

I. Introduction and Miscellaneous

Plaintiff Barnett Bank filed this action seeking declaratory and injunctive relief that Defendant Federal Deposit Insurance Corporation ("FDIC") had improperly classified deposits held by Barnett and improperly made assessments on those deposits for purposes of funding the two insurance funds that the FDIC administers to insure bank deposits in this country. At oral argument held on Defendant's instant motion to dismiss, the parties informed

the Court that a parallel case was pending in the United States District Court for the Middle District of North Carolina. Since that time, the parties have provided the Court with copies of pleadings and motions filed in that case, *see* Dkt. 23, as well as the decision of that Court in favor of the FDIC, *see* Dkt. 33, and the decisions of the United States Court of Appeals for the Fourth Circuit affirming the lower court[1] and denying rehearing and denying rehearing en banc, *see* Dkts. 35 and 39, resp. Following Defendant's filing of the Fourth Circuit's opinion affirming the North Carolina District Court's opinion, *see* Dkt. 35, Plaintiff filed its Request for Briefing and Oral Argument, etc. (Dkt. 36), asserting that the Fourth Circuit's opinion was erroneous, injected new issues into this case, and warranted this Court's withholding the entry of an order on the pending motion to dismiss until after the Fourth Circuit's decision became final and the parties had additional time to brief the assertedly new issues. In its Opposition (Dkt. 38) to Plaintiff's Request, Defendant persuasively argues that no new issues have been injected into this case by the pleadings and orders from the North Carolina case and that no further briefing or argument is warranted otherwise.[2] The Court agrees and thus will deny Plaintiff's Request for Briefing and Oral Argument, etc. (Dkt. 36) and proceed to consider the merits of Defendant's pending Motion to Dismiss (Dkt. 9).

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1 The Fourth Circuit's opinion has since been published. *See Branch Banking & Trust Company v. Federal Deposit Ins. Co.*, 173 F.3d 317 (4th Cir. 1999).

2 As noted above, Defendant has since filed a Notice (Dkt. 39), attached to which is a copy of the Fourth Circuit's Order denying rehearing and denying rehearing en banc of its opinion affirming the North Carolina District Court.

II. Defendant's Motion to Dismiss

A. Motion to Dismiss Standard

It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim." *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 506 (5th Cir. 1971); *accord Confey v. Gibson*, 355 U.S. 41, 47-48 (1957). In evaluating the sufficiency of a complaint for purposes of a motion to dismiss, the allegations of the complaint must be accepted as true, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and viewed in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

II. Facts and Discussion

The facts in this case are not in dispute.[3] As noted, Plaintiff Barnett has filed this action seeking a declaratory judgment, pursuant to 28 U.S.C. § 2201, as well as a review of final agency action, pursuant to 5 U.S.C. § 702, of certain assessments made by Defendant FDIC to fund financial institution deposit insurance funds. The dispute between the parties centers on a dispute over the proper interpretation and/or application of the Federal Deposit Insurance Act ("FDIA").

In the United States there are currently two insurance funds for the deposits of financial institutions. Both are currently administered by the FDIC. One is the Bank

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[3] As the parties' filings have shown, the facts in this case are substantially similar, if not virtually identical, with those presented in the North Carolina case. *See Branch Banking & Trust Company et al. v. Federal Deposit Ins. Co.*, No. 6:97CV00270 (M.D. N.C. March 23, 1998) (memorandum opinion), *aff'd*, 173 F.3d 317 (4th Cir. 1999).

Insurance Fund ("BIF"), which insures the deposits of most commercial banks; the other is the Savings Association Insurance Fund ('SAIF"), which insures the deposits of most Savings & Loans ("S&L's"). If a BIF or SAIF institution fails, the FDIC uses the money in the relevant fund to pay off the deposits of that institution. Using a Congressionally devised formula, the FDIC determines and sets semiannual assessment rates for BIF and SAIF, and then assesses members of each fund at the applicable rate. The SAIF rate is significantly higher than the BIF rate, due at least in part to the S&L failures of the late 1980's.

Originally, responsibility for the deposit insurance funds of bank and of S&L's were divided, respectively, among the FDIC and the FSLIC. However, in the wake of the failure of many S&L's in the 1980's, the FSLIC became insolvent. Thus, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which abolished the FSLIC and vested the FDIC with the responsibility of administering both the BIF and the SAIF.

Both Plaintiff and Defendant agree that the structure of the FIRREA amendments to the FDIA, as well as the Congressional intent, in creating the BIF and the SAIF was to create two *separate* deposit insurance funds. Generally, an institution is a member of either the BIF or the SAIF and pays assessments on its deposits at a rate dependent upon its membership. 12 U.S.C. § 1817(b). The FIRREA amendments to the FDIA also placed a five-year moratorium on so-called "conversion transactions," whereby, as a result of a transaction between fund members, assets might be shifted from one fund to another, whether such "conversion

transaction" was effected by a merger, acquisition, or otherwise. *See* 12 U.S.C. § 1815(d)(2)(A)(ii).[4]

Section 1815(d)(2)(B) defines such "conversions" as follows:

> For purposes of this paragraph, the term "conversion transaction" means–
>
> (i) the change of status of an insured depository institution from a Bank Insurance Fund member to a Savings Association Insurance Fund member or from a Savings Association Insurance Fund member to a Bank Insurance Fund member;
>
> (ii) the merger or consolidation of a Bank Insurance Fund member with a Savings Association Insurance Fund member;
>
> (iii) the assumption of any liability by–
>
> (I) any Bank Insurance Fund member to pay any deposits of a Savings Association Insurance Fund member; or
>
> (II) any Savings Association Insurance Fund member to pay any deposits of a Bank Insurance Fund member;

---

[4] Originally in 1989, § 1815(d)(2)(A)(ii) directed that the moratorium was to last for five years, beginning on August 9, 1989. Subsequently, this moratorium was extended "for the later of the five-year period beginning on August 9, 1989, or the date on which the [SAIF] first meets or exceeds the designated reserve ration [sic] for such fund." This moratorium has now been lifted. A 1996 Act of Congress provided for the capitalization of the SAIF by a special assessment (by the FDIC) of all SAIF-assessable deposits. Now, if an institution seeks to convert its fund membership (that is, engage in a conversion transaction), it must both seek the approval of the FDIC and pay "exit" and "entrance" fees. 12 U.S.C. § 1815(d)(2)(E) & (F).

(iv) the transfer of assets of–

(I) any Bank Insurance Fund member to any Savings Association Insurance Fund member in consideration of the assumption of liabilities for any portion of the deposits of such Bank Insurance Fund member; or

(II) any Savings Association Insurance Fund member to any Bank Insurance Fund member in consideration of the assumption of liabilities for any portion of the deposits of such Saving Association Insurance Fund member; and

(v) the transfer of deposits–

(I) from a Bank Insurance Fund member to a Savings Association Insurance Fund member; or

(II) from a Savings Association Insurance Fund member to a Bank Insurance Fund member; in a transaction in which the deposit is received from a depositor at an insured depository institution for which a receiver has been appointed and the receiving insured depository institution is acting as agent for the Corporation in connection with the payment of such deposit to the depositor at the institution for which a receiver has been appointed.

However, included in the FIRREA amendments to the FDIA was the so-called Oakar Amendment to the moratorium (so named for its sponsor) which, inter alia, allowed BIF banks to acquire the assets of SAIF member institutions (*i.e.*, engage in "conversion transactions") with a catch – the BIF member bank would have to continue to pay

fund assessments on those deposits at the SAIF assessment rate.[5]

Section 1815(d)(3)(B)(I) provides for the assessment of such acquired deposits at SAIF rates, pursuant to the method contained in § 1815(d)(3)(C), whereby the FDIC is to determine the amount of transferred or acquired SAIF deposits (the "AADA" or Adjusted Attributable Deposit Amount) on which a BIF member bank had to pay SAIF assessments. Specifically, § 1815(d)(3)(B)(I) provides:

> (I) Assessments by SAIF
>
> In the case of any *acquiring. assuming, or resulting depository institution* which is a Bank Insurance Fund member, that portion of the deposits of such member for any semiannual period which is equal to the adjusted attributable deposit amount (determined under subparagraph (c) with respect to the transaction) shall be treated as deposits which are insured by the Savings Association Insurance Fund.

(emphasis added). Section 1815(d)(3)(I), in turn, defines the phrase "acquiring, assuming, or resulting depository institution" as:

> . . . any insured depository institution which–
>
> (I) results from any transaction described in paragraph [§ 1815(d)](2)(B)(ii) and approved under this paragraph;

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[5] The underlying rationale was to give the private banking industry an incentive to acquire the assets of financially troubled S&L's, and thereby decrease the bailout costs to taxpayers.

> (ii) in connection with a transaction described in paragraph [§ 1815(d)](2)(B)(iii) and approved under this paragraph, assumes any liability to pay deposits of another insured depository institution; or
>
> (iii) in connection with a transaction described in paragraph [§ 1815(d)](2)(B)(iv) and approved under this paragraph, acquires assets from any insured depository institution in consideration of the assumption of liability for any deposits of such institution.

The assessments of which Barnett complains and challenges in this action were made based upon Barnett's 1996 corporate restructuring. Specifically, in June of 1996, Barnett acquired 26 sister bank subsidiaries by merger from its parent holding company. In September 1996, Barnett acquired three additional bank affiliates by merger. All of these acquired banks were BIF members; none were SAIF members. However, some of these acquired BIF member banks (seventeen, it appears)[6] had, prior to the 1996 merger/restructuring, assumed or acquired deposits of SAIF members in Oakar transactions.

After the 1996 merger/restructuring, Barnett filed its required quarterly financial statements with the FDIC. On this worksheet a financial institution is to report the amount(s) of deposits attributable to Oakar transactions and thus assessable under the SAIF rate. Barnett reported none. The FDIC disagreed, changed Barnett's worksheet to reflect what it felt was the correct amount of SAIF deposits, and assessed SAIF assessments accordingly. Barnett challenges

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[6] Barnett only states these numbers in terms of merged banks which had never been involved in Oakar transactions.

the FDIC's authority to do so, whether by statute, regulation, or otherwise.

The FDIC relies primarily on the argument that its action(s) is necessary and proper administrative policy formulation and rule making to fill in gaps in the statutory framework with which it is charged to administer. Barnett relies on a plain language reading of the statute and challenges both the propriety of the FDIC's administrative action and whether such action/interpretation is entitled to judicial deference.

According to the FDIC, the statutory gap in the FDIA (*i.e.*, the question not expressly addressed by the statute) is how to properly assess subsequent transfers of the deposits formerly held by SAIF members. The FDIC maintains that it has properly filled in this statutory gap through administrative interpretation. Specifically, in 1990, the FDIC issued an advisory opinion, in the form of an interpretive letter – known as the "Rankin letter" – wherein the FDIC set forth the procedure for assessing such deposits, the upshot of which is that SAIF deposits would continue to be assessed at the SAIF rate, even if subsequently transferred from one BIF-member Oakar institution to another BIF member institution. *See* FDIC Advisory Op. 90-11 (June 15, 1990).[7] The FDIC asserts that such interpretation is entitled to judicial deference and, additionally, is reasonable, comports with Congressional intent, and does not conflict with the plain language of the statute.

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[7] Just before the commencement of this litigation, but after the transactions at issue in this case had been consummated, this approach was, after proper notice and comment, adopted as official procedure by the FDIC. *See* 12 C.F.R. pt. 327.

Barnett argues that BIF or SAIF fund assessments are made solely on the basis of a financial institution's membership in one fund or another, with the limited exception of the Oakar Amendment. Barnett concedes that the Oakar Amendment authorizes the FDIC to assess certain deposits of a BIF bank at SAIF rates, but maintains that, according to the plain language of the statute, such assessment is authorized *only if* those deposits were obtained by the BIF bank through a transaction with a SAIF member institution. Barnett argues that such is not the case here, as all of the affiliates obtained by Barnett in its 1996 merger/restructuring were BIF members.

III. Conclusion

As this is a case in which the Court is being called upon to review an agency's construction of the statute which it administers, the Court will apply the analytical framework set forth in *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). First, the Court determines "whether Congress has direly spoken to the precise question at issue." *Id.* at 842. Assuming that the Court determines that Congress has not so spoken, the Court is to determine whether the relevant agency's resolution of that question, if any, is "based on a permissible construction of the statute." *See id* at 843.

The Court agrees with the FDIC that the statutory language of the FDIA, and specifically of the Oakar Amendment, is ambiguous as to its application to transactions such as that presented in the instant case, where what would otherwise be a conversion transaction occurs between a BIF member institution and a BIF Oakar institution that holds deposits which are assessed as SAIF-insured as a result of a prior Oakar conversion transaction. It is not clear whether, in defining the term "conversion transaction," Congress specifically meant to exclude transactions of the kind that Barnett entered into with its

affiliates; there is simply no language in the statute that specifically addresses that situation. The FDIC thus properly filled that gap by promulgating an opinion – and later adopting a regulation – that SAIF-insured deposits held by an Oakar institution that subsequently engages in a merger with a BIF member institution are to continue to be assessed at the SAIF rate. The Court further finds that the FDIC's opinion – and later regulation – on how to treat the above transactions is consistent with the FDIA, FIRREA, and other relevant laws, insofar as it furthers FIRREA's purpose of recapitalizing the FSLIC, and also furthers the Oakar Amendment's purpose of allowing certain conversion transactions between SAIF member institutions and BIF member institutions to utilize private capital, in part, to finance the S&L bailout, while preventing SAIF-insured deposits from being converted to the BIF fund which would avoid the higher SAIF assessment rate but could jeopardize the SAIF fund.[8]

Upon consideration thereof, it is hereby **ORDERED**:

1. Plaintiff's Request for Briefing and Oral Argument, etc. (Dkt. 36) is **DENIED**.

2. Defendant's Motion to Dismiss (Dkt. 9) is **GRANTED** and Plaintiff's Complaint is **DISMISSED with prejudice**.

3. The Clerk is **DIRECTED** to enter Judgment in favor of Defendant and against Plaintiff and to close this case.

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[8] However, as this cause is before the Court on a motion to dismiss, the Court makes no finding that Plaintiff engaged in the transactions at issue herein for the purpose of avoiding continued assessment at the SAIF rate, and indeed does not need to make such a finding in order to reach the disposition set forth herein.

4. All other motions not expressly ruled upon herein are **DENIED as moot.**

DONE AND ORDERED, at Jacksonville, Florida, this 28th day of September, 1999.

/s/ Ralph W. Nimmons, Jr.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record
Courtroom Deputy Clerk
Judicial Assistant

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-14863

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
an agency of the United States of America,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

(May 16, 2001)

BEFORE: EDMONDSON, CARNES and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Bank of America, N.A., is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 14 2001
OFFICE OF THE CLERK

No. 01-443

In the Supreme Court of the United States

BANK OF AMERICA, N.A., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Deposit Insurance Corporation's longstanding interpretation of the Oakar Amendment, 12 U.S.C. 1815(d)(3), which is reflected in a formal regulation adopted pursuant to notice-and-comment procedures.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Branch Banking & Trust Co. v. *FDIC*, 172 F.3d 317 (4th Cir. 1999)	2, 3, 4, 5, 6, 11, 15, 18
Chevron U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	9, 12
Matz v. *Household Int'l Tax Reduction Inv. Plan*, 227 F.3d 971 (7th Cir. 2000)	18
United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001)	11, 12, 16, 17, 18
United States v. *Winstar Corp.*, 518 U.S. 839 (1996)	2

Statutes, regulations and rule:

Deposit Insurance Funds Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009	3
12 U.S.C. 1817 note	3
§ 2702	3
§ 2702(c)	3
§ 2710(8)	3
Financial Insurance Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (12 U.S.C. 1811 *et seq.*)	2
12 U.S.C. 1812(g)	18
12 U.S.C. 1815(d)(2)	3, 7, 8, 13
12 U.S.C. 1815(d)(2)(B)(ii)	4
12 U.S.C. 1815(d)(2)(B)(v)	4
12 U.S.C. 1815(d)(2)(C)	4

Statutes, regulations and rule—Continued: Page

12 U.S.C. 1815(d)(2)(E) 4
12 U.S.C. 1815(d)(3) 4
12 U.S.C. 1815(d)(3)(B) 4, 5
12 U.S.C. 1815(d)(3)(B)(i) 4, 5
12 U.S.C. 1815(d)(3)(B)(ii) 4, 5
12 U.S.C. 1815(d)(3)(C) 5
12 U.S.C. 1815(d)(3)(D) 5
12 U.S.C. 1815(d)(3)(E)(iii) 5
12 U.S.C. 1815(d)(3)(G) 5
12 U.S.C. 1815(d)(3)(H) 5
12 U.S.C. 1817 3
12 U.S.C. 1817(b) 3
12 U.S.C. 1817(*l*)(4) 14
12 U.S.C. 1817(*l*)(5) 14
12 U.S.C. 1821(a)(4)-(6) 2
12 U.S.C. 1821(a)(4)(A)(ii) 2
12 U.S.C. 1821(a)(5) 2
12 U.S.C. 1821(a)(6) 2
12 C.F.R. (1997):
Pt. 312 4
Section 327 7
Section 327.37(b) 8
Fed. R. Civ. P. 12(b)(6) 9

Miscellaneous:

FDIC Advisory Op. No. 90-22, 1990 FDIC Interp. Ltr. LEXIS 23 (June 15, 1990) 6, 7
FDIC Interp. Ltr. 92-80, 1992 WL 813385 (Nov. 16, 1992) 7
FDIC Interp. Ltr. 93-8, 1993 WL 853505 (Jan. 29, 1993) 7
FDIC Interp. Ltr. 95-27, 1995 WL 788916 (May 23, 1995) 7
56 Fed. Reg. (1991):
p. 29,893 4
p. 29,894 4

Miscellaneous—Continued: Page

61 Fed. Reg. (1996):
p. 64,960 7
p. 64,962 ..... 7, 8, 13
pp. 64,962-64,963 ..... 8, 14, 17
p. 64,963 8

In the Supreme Court of the United States

No. 01-443

BANK OF AMERICA, N.A., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 244 F.3d 1309. The opinion of the district court (Pet. App. 27a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2001. A petition for rehearing was denied on May 16, 2001 (Pet. App. 39a). On August 1, 2001, Justice Kennedy extended the time in which to file the petition for writ of certiorari until September 13, 2001. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (12 U.S.C. 1811 *et seq.*), in response to the continuing and accelerating deterioration of the savings-and-loan industry at that time and the pronounced insolvency of the Federal Savings and Loan Insurance Corporation (FSLIC) insurance fund. Among its significant reforms, FIRREA abolished the FSLIC and shifted its deposit insurance functions to the Federal Deposit Insurance Corporation (FDIC). See 12 U.S.C. 1811 *et seq.*; *United States* v. *Winstar Corp.*, 518 U.S. 839, 856 (1996); Pet. App. 3a; *Branch Banking & Trust Co.* v. *FDIC*, 172 F.3d 317, 319-321 (4th Cir. 1999).

FIRREA established two separate deposit insurance funds within the FDIC: the Bank Insurance Fund (BIF), to cover the deposits of commercial banks; and the Savings Association Insurance Fund (SAIF), to cover the deposits of savings and loan associations. See 12 U.S.C. 1821(a)(4)-(6); Pet. App. 3a. To replenish the SAIF, which had been depleted by the failure of numerous savings and loan institutions in the 1980s, SAIF-member institutions were required to pay higher deposit insurance premiums than were BIF-member institutions. See Pet. App. 3a.

FIRREA took additional steps to maintain the integrity of the BIF and SAIF funds and their independence from each other. FIRREA gave each fund its own insurance responsibilities (12 U.S.C. 1821(a)(5) and (6)), required that the funds be "maintained separately and not commingled" (12 U.S.C. 1821(a)(4)(A)(ii)), and mandated that each fund be separately funded through assessments upon its

respective members (12 U.S.C. 1817(b)). See Pet. App. 3a, 15a.

2. In order to prevent depository institutions from evading the higher SAIF assessments applicable to savings association deposits, Congress imposed a moratorium on transfers of deposits from SAIF-member savings associations to BIF-member banks. 12 U.S.C. 1815(d)(2). The moratorium was originally imposed for five years, and was later extended until 1996, when it ended with the passage of the Deposit Insurance Funds Act of 1996 (Funds Act), Pub. L. No. 104-208, 110 Stat. 3009. See Pet. App. 3a; *Branch*, 172 F.3d at 320-321.[1] While it was in effect, the moratorium applied to any "conversion transaction," defined to include "the merger or consolidation of a Bank Insurance Fund [BIF] member with a Savings Association Insurance Fund [SAIF] member," or any other transaction involving "the transfer of deposits" from a BIF-member institution to a SAIF-member institution (or from a SAIF-member institution to a BIF-member institution).

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[1] The special SAIF assessment at issue in this case was authorized by the 1996 Funds Act, which was enacted for the purpose of recapitalizing the SAIF. The Funds Act provides that the FDIC shall levy a one-time special assessment on the "SAIF-assessable deposits" of insured depository institutions. Section 2702 of the Funds Act, published at 12 U.S.C. 1817 note. It further defines the term "SAIF-assessable deposits" to include deposits that are "treated as insured by SAIF under [the Oakar Amendment]." Section 2710(8) of the Funds Act, published at 12 U.S.C. 1821 note. The "SAIF-assessable deposits" that were subject to the special assessment were to be determined as of March 31, 1995. Section 2702(c) of the Funds Act, published at 12 U.S.C. 1817 note. As a result, deposits that were assessable by the SAIF on March 31, 1995, such as the Oakar deposits held by the Oakar banks that merged with Bank of America in 1996, were subject to the special assessment.

12 U.S.C. 1815(d)(2)(B)(ii) and (v); Pet. App. 4a; *Branch*, 172 F.3d at 320.

The moratorium had certain limited exceptions, each requiring FDIC approval. 12 U.S.C. 1815(d)(2)(C). Those exceptions required institutions participating in a conversion transaction to pay both an "exit" fee to the insurance fund being exited and an "entrance" fee to the insurance fund being entered. 12 U.S.C. 1815(d)(2)(E); Pet. App. 4 n.3; *Branch*, 172 F.3d at 321. Such exit and entrance fees were significant in amount, and could make a conversion transaction cost prohibitive. See 12 C.F.R. Pt. 312; 56 Fed. Reg. 29,893, 29,894 (1991).

3. The Oakar Amendment, 12 U.S.C. 1815(d)(3), another limited exception to the moratorium, permitted the FDIC to approve a conversion transaction between a SAIF-member institution and a BIF-member institution without the initial payment of exit and entrance fees, so long as the institution resulting from the transaction assumed the continuing responsibility to pay assessments to both the SAIF and the BIF in proportion to the pre-transaction amount of deposits insured by each fund. 12 U.S.C. 1815(d)(3)(B). For example, if the acquiring bank was a BIF-insured institution, then the resulting hybrid institution would have to pay deposit insurance premiums both to its primary fund, in this example the BIF, and to its secondary fund, the SAIF. See 12 U.S.C. 1815(d)(3)(B)(i) and (ii). Such a hybrid institution is commonly referred to as a "BIF-Oakar institution" (to distinguish it from a "SAIF-Oakar institution," which would result if the acquiring institution was insured by the SAIF). The amount of insurance assessments paid by a BIF-Oakar bank to its secondary fund, the SAIF, was based on its adjusted attributable deposit amount (AADA), which

was equal to the value of the deposits acquired from the SAIF-insured institution. See 12 U.S.C. 1815(d)(3)(C); Pet. App. 5a. In other words, the amount of insurance assessments that an Oakar bank had to pay to each fund was a function of the relative portions of BIF-assessed and SAIF-assessed deposits at the time of the conversion transaction. See 12 U.S.C. 1815(d)(3)(B) and (D); Pet. App. 5a.[2]

Accordingly, the Oakar Amendment provided that when a BIF-insured bank acquires a SAIF-insured savings association, the savings association's deposits "shall be treated as deposits which are insured by the Savings Association Insurance Fund." 12 U.S.C. 1815(d)(3)(B)(i).[3] It further provided that if an Oakar bank fails, any loss incurred by the FDIC shall be allocated between the BIF and the SAIF in amounts "reflecting the amount" of the bank's deposits that are insured by the BIF and the SAIF. 12 U.S.C. 1815(d)(3)(G); Pet. App. 15a. In addition, Congress mandated that nothing in the Oakar Amendment "shall * * * be construed as authorizing transactions which result in the transfer of any insured depository institution's Federal deposit insurance from [one] Federal deposit insurance fund to the other * * *." 12 U.S.C. 1815(d)(3)(E)(iii).

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[2] The Oakar Amendment also provided that upon expiration of the moratorium, an Oakar institution would be permitted to convert all of its deposits to its primary fund upon payment of entrance and exit fees. 12 U.S.C. 1815(d)(3)(H); see *Branch*, 172 F.3d at 322 n.9.

[3] Similarly, if a SAIF-insured savings association acquires a BIF-insured bank, the deposits transferred by the bank are "treated as deposits which are insured by the Bank Insurance Fund." 12 U.S.C. 1815(d)(3)(B)(ii).

4. Following the enactment of FIRREA and the Oakar Amendment, a question arose as to whether a BIF-Oakar institution's SAIF assessment would survive if the BIF-Oakar institution's SAIF-assessable deposits were subsequently acquired by another BIF-member institution. Put differently, would the FDIC assess a BIF-member bank that acquired deposits from a BIF-Oakar institution at the SAIF rate for the acquired deposits that were subject to the SAIF assessment? Failure to continue the SAIF assessment after the second transaction would allow banks to circumvent the higher SAIF assessments by engaging in two transactions, where the statute specifically prohibited such a circumvention in a single transaction.

Because this question is not specifically addressed by statute, the FDIC in 1990 issued an interpretive letter known as the Rankin Letter. See FDIC Advisory Op. No. 90-22, 1990 FDIC Interp. Ltr. LEXIS 23 (June 15, 1990); Pet. App. 6a; *Branch*, 172 F.3d at 322-323. The FDIC concluded in that interpretive letter that deposits subject to a SAIF assessment would maintain that character when transferred from a BIF-Oakar institution to a BIF-member institution. As relevant here, the Rankin Letter provided that when an acquiring BIF-member institution acquired all the deposits of a BIF-Oakar institution, the deposits subject to a SAIF assessment would remain subject to that assessment after the acquisition.[4]

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[4] More technically, the Rankin Letter provided that an Oakar institution would be deemed to transfer its primary fund deposits first, and would be deemed to transfer its secondary fund deposits only after its primary fund deposits had all been transferred. Thus, the FDIC advised, the treatment of an Oakar-related transfer would depend upon whether the total amount of deposits being transferred would reduce the Oakar bank's total deposit base

5. On December 10, 1996, after notice-and-comment rulemaking, the FDIC published a final regulation codifying its then-longstanding position regarding deposit transfers by Oakar institutions to BIF-member banks. See 61 Fed. Reg. 64,960 (1996), codified at 12 C.F.R. 327 (1997); Pet. App. 6a-7a. The FDIC noted in the preamble to the regulation that "[n]either section 5(d)(2) [12 U.S.C. 1815(d)(2)] nor the Oakar Amendment explicitly addresses the case of an Oakar institution that transfers deposits to another institution," and that "[t]he FDIC has by interpretation developed a procedure for attributing the transferred deposits to the BIF and the SAIF." 61 Fed. Reg. at 64,962. Although the FDIC later took the view that its regulation was a permissible interpretation of the ambiguous statutory terms "Bank Insurance Fund member" and "Savings Association Insurance Fund member" as used in the statutory definition of a "conversion transaction," in the preamble to the regulation the FDIC viewed a

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below the amount of its AADA. If the total amount of deposits transferred would reduce the Oakar bank's total deposit base below the amount of its AADA, then the transaction would be deemed a "conversion transaction," and the acquiring institution would be responsible for the SAIF assessment for any SAIF-assessable deposits it acquired:

> "[I]f the aggregate of all deposits transferred to BIF-member banks reduces the Oakar bank's total deposit base below the amount of its [AADA], any subsequent deposit transfer by the Oakar bank to another BIF-member bank would be regarded as a conversion transaction * * * ."

FDIC Advisory Op. No. 90-22, 1990 FDIC Interp. Ltr. LEXIS 23, at 1* (June 15, 1990); Pet. App. 6a. The FDIC subsequently reiterated this approach in other interpretive letters. FDIC Interp. Ltr. 92-80, 1992 WL 813385 (Nov. 16, 1992); FDIC Interp. Ltr. 93-8, 1993 WL 853505 (Jan. 29, 1993); FDIC Interp. Ltr. 95-27, 1995 WL 788916 (May 23, 1995).

BIF-Oakar bank as formally a BIF member, while in substance a member of both funds. 61 Fed. Reg. at 64,962, 64,963.

Moreover, even if the regulation was not precise about the basis for the regulation, it was clear about the regulation's substance. The regulation, like the FDIC's earlier interpretive letters, required that in any transaction involving the transfer of deposits by an Oakar institution, "[t]he deposits [held by the resulting institution] shall be deemed * * * to be insured by the same fund or funds in the same amount or amounts as the deposits were so insured immediately prior to the transaction." 12 C.F.R. 327.37(b). Thus, under the regulation, if a BIF-member bank acquired the deposits of an Oakar bank, the deposits transferred by the Oakar bank are treated as being insured by the SAIF and the BIF in the same amounts as they were insured immediately before the transfer. The FDIC explained that "[t]he contrary view would render [12 U.S.C. 1815(d)(2)] and the Oakar Amendment meaningless," because under that view "a BIF-member buyer could acquire deposits from a SAIF-member seller without paying entrance and exit fees simply by passing the deposits through an intermediary BIF-member Oakar bank," and "the acquired deposits would be neither SAIF-assessed nor SAIF insured." 61 Fed. Reg. at 64,962. The FDIC also explained that its interpretation would prevent manipulative strategies designed to evade obligations to the SAIF (*id.* at 64,962), had "the virtue of simplicity" (*id.* at 64,963) and "the virtue of being well established and well understood" (*ibid.*), and is consistent with the structure and purpose underlying the Oakar Amendment (*id.* at 64,962-64,963).

6. Petitioner Bank of America acquired 29 sister bank subsidiaries of its parent holding company through

two merger transactions undertaken in June and September, 1996.[5] Before the mergers, petitioner was a BIF-insured bank that had never engaged in an Oakar transaction. However, 17 of the 29 acquired banks were Oakar banks that paid deposit insurance assessments to both the BIF and the SAIF. Pet. App. 8a. Following the mergers, the FDIC required petitioner to pay assessments on its deposits to the SAIF to reflect the SAIF-assessability of the deposits formerly held by the Oakar banks. Those assessments included a semi-annual assessment, which for the second half of 1996 was in the amount of $3,622,425.53, and a one-time special assessment in the amount of $25,296,967. Gov't C.A. Brief 8.

7. In 1997, petitioner filed a suit for declaratory and injunctive relief against the FDIC in the United States District Court for the Middle District of Florida. Pet. App. 27a. Petitioner alleged that the SAIF assessments imposed upon it by the FDIC were contrary to the plain meaning of the statutory definition of "conversion transaction," which it alleged was limited to transfers involving institutions that were "members" of different insurance funds. See *id.* at 8a-9a, 36a.

The district court granted the FDIC's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 27a-38a. Applying *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the district court rejected petitioner's challenge to the FDIC's assessments, concluding that the Oakar Amendment is ambiguous as to its application to

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[5] Barnett Bank was the original party to this suit. After the initiation of the appeal to the court of appeals, Bank of America acquired Barnett Bank. Accordingly, all references to petitioner are to Bank of America. Pet. App. 2a n.1.

deposit transfers between a BIF-member bank and a BIF-Oakar bank, and that the FDIC's longstanding interpretation of the statute as reflected in its regulation is reasonable and consistent with the text, structure, and purposes of the statutory scheme. Pet. App. 36a-37a.

8. The court of appeals affirmed. Pet. App. 1a-26a. Applying *Chevron*, the court of appeals held at the first step of its *Chevron* analysis that the Oakar Amendment is ambiguous because it can be construed to regard an Oakar institution as a "member" of both the BIF and the SAIF. Accordingly, "the statute is ambiguous about whether the merger of a BIF-member institution with a BIF-Oakar institution is a 'conversion transaction' under the Oakar Amendment; Congress did not speak directly and unambiguously to that precise issue." *Id.* at 16a. The court of appeals also concluded that "the statute is ambiguous in part because the 'substance of the relationship' between an Oakar institution and the two funds to which it pays insurance premiums makes it seem as though it is insured by (and thus a member of) both funds." *Id.* at 24a.

The court of appeals rejected petitioner's contentions that the FDIC should be bound by its statement in the preamble to the regulation that an Oakar institution was a "member" only of its primary deposit insurance fund, and that the court should reject more recent statements by the FDIC indicating the agency considered the Oakar Amendment's "member" language to be ambiguous. The court of appeals explained that any possible inconsistency in the FDIC's position could have no bearing on the court's analysis at the first step of the *Chevron* analysis because "[i]t is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute

without regard to an agency's prior, or current, interpretation." Pet. App. 19a. The court also noted that the policy reflected in the regulation "has always remained consistent." *Id.* at 26a.

At the second step of its *Chevron* analysis, the court of appeals upheld the FDIC's interpretation of the Oakar Amendment as "embodied in the regulation" (as opposed to any informal statements made by the FDIC during the litigation) because the regulation is consistent with the purpose and intent of FIRREA and the Oakar Amendment. Pet. App. 25a. The court of appeals also noted that Bank of America had not challenged the permissibility of the FDIC's longstanding interpretation under the second step of *Chevron*. *Id.* at 25a n.8.

ARGUMENT

The decision of the court of appeals properly upheld the FDIC's interpretation of the Oakar Amendment, which prevents circumvention of the manifest intent of Congress to prevent acquiring institutions from avoiding the payment of assessments on SAIF-insured deposits. That conclusion does not conflict with any decision of this Court, and it accords with the Fourth Circuit's decision in *Branch*, 172 F.3d at 317, the only other court of appeals decision to have addressed the issue.

Petitioner's argument that the decision below conflicts with *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001), by improperly deferring to an informal litigating position of the FDIC misconstrues the court of appeals' decision. Moreover, petitioner has failed to preserve any argument that would render *Mead* relevant. As the court of appeals stated in its decision, petitioner never raised any issue before the court of

appeals concerning the second step of the *Chevron* analysis, the only element of the *Chevron* analysis relevant to petitioner's *Mead* argument. See Pet. App. 25a n.8 ("Bank of America did not contest the second step [of the *Chevron* analysis] before us, instead aiming all of its arguments at the first step."). Accordingly, the petition for certiorari should be denied.

1. Under *Chevron*, courts reviewing an agency's interpretation of statutory language apply a two-step test. If a court determines that a congressional enactment speaks directly "to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842, 843. If "the statute is silent or ambiguous with respect to the specific issue," however, the court must sustain an agency's interpretation and implementing regulations if they are "based on a permissible construction of the statute." *Id.* at 843. In *Mead*, this Court further refined the standard for judicial review of an agency's implementation of a particular statutory provision by holding that certain types of informal agency actions are not entitled to deference under the *second step* of the *Chevron* analysis. 121 S. Ct. at 2171, 2173-2177.

Petitioner's sole ground for seeking certiorari is an alleged conflict with this Court's decision in *Mead*. Petitioner contends that "the Eleventh Circuit erred in deferring under *Chevron* to an agency interpretation of a statute," where that interpretation was "offered for the first time in litigation" and "contradict[s] the agency's definition of the disputed statutory term as expressed in notice-and-comment rulemaking." Pet. 8-9. Contrary to petitioner's argument, however, the court of appeals expressly did *not* defer to any recent or informal interpretation by the FDIC in upholding the FDIC's implementation of the Oakar Amendment.

In concluding under the first step of *Chevron* that the statutory provisions at issue were sufficiently ambiguous as to indicate an intent by Congress to delegate interpretive authority to the FDIC, the court of appeals appropriately declined to defer to any position of the FDIC, post-litigation or otherwise. The court of appeals recognized that deference is applied at step two of *Chevron*, not step one. The court expressly held that "[i]t is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation." Pet. App. 19a; *id.* at 21a-22a ("[I]t is ultimately the function of the judiciary, not the administrative agency, to decide whether Congress spoke directly to the issue in question."); *id.* at 25a ("[T]he fact that the FDIC identified a different source of its perceived authority to adopt the regulation is of no moment under the first prong of *Chevron*.").

The court therefore conducted its own analysis of the relevant statutory language and concluded that "the statute is ambiguous about whether the merger of a BIF member institution with a BIF Oakar institution is a 'conversion transaction' under the Oakar Amendment; Congress did not speak directly and unambiguously to that precise issue." Pet. App. 16a. That conclusion comports with the FDIC's own assessment of the Oakar Amendment in promulgating the regulation, when it noted that "neither [12 U.S.C. 1815(d)(2)] nor the Oakar Amendment explicitly addresses the case of an Oakar institution that transfers deposits to another institution." 61 Fed. Reg. at 64,962.

The court of appeals, moreover, emphasized that "the agency's basis for adopting the regulation is entirely consistent with the basis of our holding." Pet. App. 24a. As the court of appeals explained:

> The original grounds the FDIC identified for promulgating the regulation was that nominal fund membership did not determine whether a conversion transaction had taken place; instead, the FDIC would look to the substance of the relationship between the Oakar institution and the FDIC as insurer. Similarly, our conclusion is that the statute is ambiguous in part because the "substance of the relationship" between an Oakar institution and the two funds to which it pays insurance premiums makes it seem as though it is insured by (and thus is a member of) both funds.

Ibid.[6] Thus, while the court did not defer to any position of the FDIC under the first step of the *Chevron* analysis, it reached essentially the same conclusion that

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[6] Compare 61 Fed. Reg. at 61,962-61,963:

> Membership entails a well-defined set of obligations that the institution and the FDIC have to each other. * * * Oakar institutions owe assessments to both funds, and both funds must share the loss that the FDIC would suffer if an Oakar institution were to fail. The FDIC resolves those conflicting themes by focusing on the relationship of an Oakar institution to the FDIC—the set of obligations that the label "BIF-member" or "SAIF-member" ordinarily signifies—and not on nominal fund membership. * * * Put another way, the FDIC considers that the label "member" must be given only that degree of significance that is appropriate to preserve the integrity of the two-fund structure."

The FDIC thus regarded the relationship of an Oakar institution to the FDIC in terms of its *insurance* relationship to both funds. The court of appeals relied on the definitions of SAIF member and BIF member in 12 U.S.C. 1817(*l*)(4) and (5), which likewise turn on whether the institution is "insured" by the relevant fund. Those definitions simply reinforce and confirm the conclusion reached by the FDIC when it promulgated the regulation, looking to the structure of the relevant statutory provisions as a whole.

the FDIC had articulated in both its regulation and in litigation. See *ibid.* ("[T]he basis for the FDIC's interpretation of the source of its authority to adopt the regulation and our subsequent interpretation are substantively the same.").

At the second step of its *Chevron* analysis, the court of appeals deferred only to the FDIC's interpretation as embodied in a formal regulation adopted after notice-and-comment. ("[T]he FDIC's interpretation of the statute, *which is embodied in the regulation*, was permissible under the highly deferential second step of the *Chevron* analysis.") (footnote omitted) (emphasis added). Pet. App. 25a. The court of appeals did not defer to any FDIC position different from that reflected in the regulation. Quoting approvingly from the Fourth Circuit's decision in *Branch*, the court of appeals stated that the FDIC regulation requiring BIF institutions that merge with BIF-Oakar institutions to continue to pay SAIF assessments was "consistent with the purpose and intent of FIRREA as a whole—to recapitalize the failing FSLIC-insured institutions." *Ibid.* (quoting *Branch*, 172 F.3d at 328). The court of appeals further found the FDIC's regulation to be "consistent with * * * the purpose of the Oakar Amendment—allowing certain conversion transactions between institutions that are BIF members and SAIF members, while protecting SAIF by requiring the resulting institution to continue to pay assessments to SAIF." *Id.* at 25a-26a.

Furthermore, the court of appeals concluded that, although in its view "the FDIC has taken inconsistent positions on the basis for its authority to adopt the interpretive regulation at issue, *the policy reflected in the regulation itself, embodied originally in the Rankin letter and later in the regulation, has always remained*

consistent." Pet. App. 26a (emphasis added). Any possible inconsistency concerned only whether the term "member" was ambiguous—a question for the court on which *Chevron* deference is not owed. The FDIC's longstanding and consistent policy embodied in the regulation, on the other hand, is relevant to the reasonableness of the agency's interpretation of an ambiguous term, to which deference is appropriate. Any possible inconsistency about the regulatory basis does not deprive the FDIC of deference to its longstanding articulation of statutory meaning embodied in notice-and-comment rulemaking. As the court of appeals recognized, the FDIC consistently held that "Congress intended to protect the SAIF by ensuring either: (1) that no SAIF-insured institution switched to the BIF (as reflected in the moratorium on conversion transactions), or (2) that a SAIF institution that engaged in an Oakar conversion transaction would continue to pay SAIF assessments until the moratorium was lifted." *Ibid.* The FDIC's policy, the court of appeals correctly held, was reasonable, consistent with the language and goals of the underlying statute, and fully entitled to *Chevron* deference. See *Mead*, 121 S. Ct. at 2172-2173 (noting that *Chevron* deference is generally appropriate where, as here, the agency acts through formal notice-and-comment rulemaking).[7]

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[7] Indeed, at all times, the FDIC's interpretation of the Oakar Amendment has been consistent with the statutory scheme of federal deposit insurance. A depository institution and the FDIC have a well-defined set of obligations to each other: the depository institution must pay assessments to a deposit insurance fund, and the FDIC must use the resources of that fund to insure the institution's deposits. As the FDIC stated in the preamble to its regulation, "Oakar institutions owe assessments to both funds, and both funds must share the loss that the FDIC would suffer if an Oakar

2. Not only is *Mead* unhelpful to petitioner because the court below deferred to an interpretation embodied in notice-and-comment rulemaking, but petitioner failed to preserve any argument to which its reliance on *Mead* could be relevant. As the court of appeals' decision specifically stated, petitioner failed to raise *any* arguments before the court of appeals regarding the second step of the *Chevron* analysis. Pet. App. 25a n.8 ("Bank of America did not contest the second step [of the *Chevron* analysis] before us, instead aiming all of its arguments at the first step."). The court of appeals properly characterized petitioner below as arguing only that "on appeal, the FDIC points to a different, and indeed antithetical, source of authority for adopting the interpretation of the Oakar Amendment than it did in the regulation." *Id.* at 16a. But as the court of appeals explained, "[t]he problem with Bank of America's argument is that, while the FDIC's new interpretation of the statute [regarding whether the definitions of BIF member and SAIF member are ambiguous] does appear to be post-hoc, or post-litigation, and is inconsistent with the position the agency took in the preamble to its regulation, those characteristics do not have any legal significance on the issue of whether the statute is ambiguous under the first step of the *Chevron* analysis." *Id.* at 19a. If *Mead* has any relevance here, however, it is only at *step two* of the *Chevron* analysis. See *Mead*, 121 S. Ct. at 2171-2174. *Mead* does not purport to change the analysis of the

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institution were to fail." 61 Fed. Reg. at 64,962-64,963. To uphold the integrity of this system, Congress has enacted protections to prevent the transfer of deposits from the SAIF to the BIF. These facts have been at the heart of the FDIC's interpretation of the Oakar Amendment, both in the regulation and before the court of appeals. See Pet. App. 26a.

step one trigger to determine whether any deference is appropriate, but rather only affects the level of deference afforded, if any level of deference is appropriate.[8] Moreover, the fact that the *Mead* decision did not issue until after petitioner's rehearing petition had been denied does not excuse petitioner's failure to raise any step-two argument as to which *Mead* might be pertinent.[9]

3. In addition, the court of appeals' decision accords with the Fourth Circuit's decision in *Branch*, the only other court of appeals decision that has addressed the issue. Although differing somewhat in their reasoning, both decisions correctly held that the relevant statutory provisions were sufficiently ambiguous to indicate an intent by Congress to confer interpretive authority on the FDIC, and that the FDIC's regulation, adopted after notice and comment, was reasonable and entitled to deference. See *Branch*, 172 F.3d at 327-329.

Finally, petitioner's argument that this case is similar to *Matz* v. *Household International Tax Reduction Investment Plan*, 227 F.3d 971 (7th Cir. 2000), a case in which this Court summarily granted certiorari, vacated,

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[8] *Mead* does address the circumstances in which a statute will be construed to delegate interpretive authority to an agency. See 121 S. Ct. 2172-2173. Here, however, Congress has expressly authorized the FDIC to promulgate regulations. See 12 U.S.C. 1812(g).

[9] Indeed, petitioner's reliance on *Mead* is particularly unpersuasive because petitioner's position in the court of appeals was based in substantial part on an effort to bind the FDIC to the position articulated in its regulatory preamble, rather than on an effort to undermine deference to the agency. The court of appeals, however, found that *no* deference was appropriate to the FDIC on the step one inquiry of whether the statute was ambiguous. That was the only inquiry at which petitioner's argument was directed.

and remanded for further consideration in light of *Mead*, is mistaken for the same reasons petitioner's *Mead* argument is mistaken. In *Matz*, the parties joined issue on step two of *Chevron*. The court of appeals deferred under step two to a position that the Internal Revenue Service expressed for the first time in an *amicus* brief submitted in another case in another court of appeals. *Id.* at 974-975. Here, in contrast, the parties' dispute concerned the step one question of whether the statute was ambiguous. As a result, the court of appeals gave no deference, and indeed found irrelevant, any agency interpretation at the first step of its *Chevron* analysis. Moreover, at the second step of its *Chevron* analysis, the court of appeals deferred only to the FDIC's longstanding interpretation embodied in a formal regulation after notice and comment. Accordingly, unlike in *Matz*, there is no need in this case to grant certiorari, vacate, and remand to the court of appeals for further proceedings in light of this Court's *Mead* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-443

IN THE

Supreme Court of the United States

BANK OF AMERICA, N.A.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

REPLY TO BRIEF IN OPPOSITION.....1

CONCLUSION.....7

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986) 2, 6

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 3, 5

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... 1, *passim*

Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995) 6

Investment Co. Inst. v. Camp, 401 U.S. 617 (1971) 5

NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co., 513 U.S. 251 (1995) 3

SEC v. Chenery Corp., 318 U.S. 80 (1943) 4

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) 3

United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001) 1, 3, 5, 6

Page

FEDERAL STATUTES AND REGULATIONS

National Bank Act, 12 U.S.C. § 92 3

Oakar Amendment, 12 U.S.C. § 1815(d)(2) & (3) ..... 1, *passim*

FDIC Final Rule, 61 Fed.Reg. 64960 (Dec. 10, 1996)..... 3

MISCELLANEOUS

Rob Blackwell, *Pressing Case, FDIC Says Refund May Hit $1.5B*, AM. BANKER, at 1 (Dec. 10, 2001)..... 6

REPLY TO BRIEF IN OPPOSITION

The petition in this case clearly established that the court of appeals deferred under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the interpretation by agency counsel offered in an appellate brief of the critical term in the governing statute even though that interpretation flatly contradicted the one adopted by the agency in notice-and-comment rulemaking. As petitioner will show, the government's efforts to escape this Court's holding in *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164 (2001), that courts should not defer to agency counsel's interpretation of a statute offered for the first time in litigation, are unconvincing.

1. In its usual fashion, the government's brief in opposition to the petition ("Opp.") carefully describes the factual and statutory background of this case. In doing so, however, the government corroborates all of petitioner's central points:

a. The entire predicate for imposing the disputed $28 million assessment at issue here was that petitioner's predecessor, Barnett Bank, had engaged in a "conversion transaction" when it acquired affiliated so-called "Oakar banks" that had themselves previously acquired savings associations, Opp. 3-4, 10, 13;

b. "Conversion transactions" that give rise to continuing liability for "Savings Association Insurance Fund" ("SAIF") assessments all involve mergers or similar transactions between a financial institution that is a "member" of the "Bank Insurance Fund" ("BIF") and another institution that is a "member" of the SAIF, Opp. 3-4, 10, 13;

c. In promulgating the notice-and-comment rule that is the basis for the assessments here, the Federal Deposit Insurance Corporation ("FDIC") interpreted the statutory

term "member" to mean that an Oakar bank is only a member of the BIF and is not a member of the SAIF, Opp. 7-8; and

d. Notwithstanding this construction of the term "member," the FDIC concluded that transactions between Barnett Bank, which indisputably was a member only of the BIF, and Oakar banks, which were also members only of the BIF under the FDIC's own definition of "member," would be regarded as "conversion transactions," because "otherwise the Oakar Amendment [would be] meaningless," and because the agency's approach would be "consistent with the structure and purpose underlying the Oakar Amendment." Opp. 8.

The remainder of the government's opposition is devoted to ill-conceived attempts to obscure the effects of its concessions that the agency itself could not reconcile its imposition of the disputed assessments here with the language of the statute *as the FDIC construed it*.

2. Like the court of appeals' opinion, the government's opposition embodies a fundamental misunderstanding of *Chevron*. Under *Chevron*, courts defer to an agency's interpretation of a statute in two situations. The first is where Congress leaves a "gap" in the statute that it expects the agency to fill. For the reasons demonstrated in the petition (Pet. 7 n.5, 11) – and *not* challenged by the government – the court of appeals could not properly have deferred to the FDIC's interpretation of the statute based on a gap-filling application of *Chevron*.[1]

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[1] The failure of Congress to provide for insurance assessments after transactions between a BIF-member bank and a BIF-member Oakar bank cannot be regarded as a "gap" in the statute that the agency was expected by Congress to fill, even assuming *arguendo* that the FDIC's rule is consistent with the relevant statutory policy. *See Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (an agency does not have power to "correct flaws that it perceives in the statute it is (continued. . .)

The other type of *Chevron* deference is where Congress uses an ambiguous term in a statute and the agency adopts a definition of that term to justify its regulation, adjudication or other pronouncement that has legal effect. In these circumstances, courts defer to the agency's construction of the "ambiguous" term as this Court has done in numerous cases.[2] Thus, in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (emphasis added), the Court stated that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute *with the implementing agency*." Where the agency has adopted a particular interpretation of an ambiguous provision, *Chevron* does not allow courts to defer to some other interpretation – in this case, agency counsel's.

(footnote continued)

empowered to administer"). In any event, gaps can be filled only through "legislative regulations." *Chevron*, 467 U.S. at 843. Such regulations operate only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In this case, the FDIC's rule is labeled "interpretative" because it was designed to impose retroactive liability upon banks. Here, for example, the FDIC rule was not effective until January 1, 1997, *see* FDIC Final Rule, 61 Fed. Reg. 64960, 64961 (Dec. 10, 1996), whereas the disputed assessments were for 1996. Accordingly, the FDIC – confronted with this argument – did not even contend in the court of appeals that its regulation deserved *Chevron* deference as a gap-filling measure. *But see* Pet. App. 26a where the penultimate sentence of the court of appeals' opinion quoted *Chevron* on gap-filling.

2 *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255 (1995), which was explicitly endorsed by this Court's decision in *Mead*, 121 S. Ct. at 2173, perfectly illustrates this type of *Chevron* deference. In that case, the disputed term was "insurance" as used in the National Bank Act, 12 U.S.C. § 92, which bars national banks from selling "insurance" in towns of more than 5,000 inhabitants. The Office of the Comptroller of the Currency ("OCC") had concluded that the annuities at issue in that case were not "insurance" within the meaning of the statute and this Court deferred to the OCC's interpretation because it agreed that "insurance" did not unambiguously extend to those annuities.

Here, the court of appeals acknowledged that, given the FDIC's own construction of the term "member" in promulgating the regulation at issue in this case, "the FDIC simply ignored the plain language of the statutory definition of 'conversion transaction' in favor of a more functional interpretation," Pet. App. 17a – an approach that the court properly characterized as "damn-the-statute-let's-be-functional . . .," *id.* at 18a. However, the court of appeals then excused the FDIC's obviously improper statutory construction by disregarding the agency's interpretation of the term "member" – that an Oakar bank was a "member" of only the BIF – when it promulgated the rule upon which the FDIC relies to sustain its assessments against petitioner. In doing so, the court of appeals deferred to statements made by agency counsel to the court that an Oakar bank "can be a member of both the BIF and the SAIF," *id.*, which were admittedly "post hoc, or post-litigation" and "inconsistent with the position the agency took" in promulgating its regulation, *id.* at 19a.

The government's suggestion (Opp. 12-14) that the court of appeals did not defer to the FDIC's "post hoc, or post-litigation" interpretation of the term "member" is plainly wrong. As the government acknowledges in its waiver argument, Opp. 17, *see infra* pp. 5-6, the court of appeals ruled for the FDIC by deferring to the FDIC counsel at "the second step" of its *Chevron* analysis. *See* Pet. App. 25a ("the FDIC's interpretation of the statute . . . was permissible under the highly deferential second step of the *Chevron* analysis"). *See also id.* at 19a-25a, devoting six pages to the relationship of *Chevron* and *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Of course, the court of appeals would never have discussed *Chevron* step 2 or the implications of agency counsel's interpretation of the statute under *Chenery* unless it was deferring to that interpretation.

3. It is impossible to imagine a clearer departure from this Court's subsequent decision in *Mead.* In

describing the spectrum of judicial responses to agency interpretations of statutes, this Court put at the very bottom an "interpretation advanced for the first time in a litigation brief," which it stated should be accorded "near indifference" by reviewing courts. *Mead*, 121 S. Ct. at 2172. The reason for this "near indifference," of course, is that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Bowen*, 488 U.S. at 212 (quoting *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)). Here, the court of appeals admitted that the views of the agency's lawyers expressed in court repudiated the FDIC's explicit construction of the ambiguous term "member" in its rulemaking. *See, e.g.*, Pet. App. 18a-19a. Such post-hoc views of the statute do not even qualify for the "near indifference" referred to in *Mead*; they should instead be rejected out of hand.

4. Unable to reconcile the court of appeals' decision with *Mead*, the government manufactures a new *Chevron* requirement – for which no support is cited and none exists – that, because deference to the agency occurs at "step 2" of *Chevron*, petitioner waived its argument by not challenging step 2. The government's theory cannot justify the decision below.

As the court of appeals explained, step 2 entailed an inquiry whether "the FDIC's interpretation [was] consistent with the purpose and intent of FIRREA as a whole" and whether "the policy reflected in the regulation itself . . . has always remained consistent." Pet. App. 25a-26a. There is no reason in the world why petitioner should have been required to argue that the FDIC counsel's approach is inconsistent with the policy underlying the Oakar Amendment in order to complain – as it did in its briefs and rehearing petition – that the court of appeals could not defer to agency counsel's interpretation of the statutory term "member" when it contradicted the agency's interpretation in its notice-and-

comment rulemaking. A court never arrives at *Chevron* step 2 until it has properly identified the agency interpretation of an ambiguity in the statute that allegedly qualifies for *Chevron* deference. *See Mead*, 121 S. Ct. at 2171-72. Here, the court of appeals obviously erred in relying upon FDIC counsel's view of the meaning of the term "member." That being the case, the step 2 inquiry is moot.

Moreover, as previously discussed, Pet. 11-12, petitioner relied upon two of this Court's decisions to support the now fundamental proposition of statutory construction that agencies must respect the language of the statutes that they are charged with administering and may *not* resort to policy in adding features that they regard as "desirable or necessary to protect the public interest," *Dimension Fin. Corp.*, 474 U.S. at 374, or as "achiev[ing] the 'statutory purposes' more effectively," *Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Thus, even assuming the FDIC got the policy right, it clearly got the statutory construction wrong.

5. The striking departure of the court of appeals from this Court's *Chevron* and statutory construction jurisprudence would, standing alone, justify granting the petition. But there is far more to this case. The FDIC does not dispute the enormous sums at issue here and the numerous other transactions that would be affected by a ruling from this Court on the merits. *See* Pet. 12. Indeed, according to this month's press reports, the FDIC estimates that these other transactions may involve more than $600 million in additional assessments under the approach to the Oakar Amendment embraced by the FDIC's rule and upheld by the court of appeals. *See* Rob Blackwell, *Pressing Case, FDIC Says Refund May Hit $1.5B*, AM. BANKER, at 1 (Dec. 10, 2001) (describing the FDIC's potential liability for

lawsuits claiming over-assessments based on treating BIF-Oakar banks as SAIF members).

This Court's review would ensure that these enormous liabilities are not sustained under reasoning that defies the settled principles of administrative law and statutory construction that this Court has taught for the past quarter century.

CONCLUSION

For the foregoing reasons as well as those raised in the petition, the Court should grant the petition.

Respectfully submitted,

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